TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, [redacted] 1920

No. [redacted] 253

THE UNITED STATES, APPELLANT,

vs.

L. P. & T. A. SMITH.

APPEAL FROM THE COURT OF CLAIMS.

[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 734.

THE UNITED STATES, APPELLANT,

vs.

L. P. & J. A. SMITH.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. PETITION AND EXHIBITS "A" AND "B." FILED OCTOBER 20, 1902.

In the Court of Claims of the United States.

L. P. & J. A. SMITH, CLAIMANT,
vs.
THE UNITED STATES. } No. 23013.

Petition.

To the honorable the judges of the United States Court of Claims:

Your petitioner, L. P. and J. A. Smith, respectfully shows as follows:

I. That it is a partnership composed of Louis P. Smith and James A. Smith doing business under the name of L. P. & J. A. Smith, and formed for the purpose, among other things, of entering into contracts of the character hereinafter set forth. That they are citizens of the United States, residents of the city of Cleveland in the State of Ohio, where they have their principal office and place of business, and that they have at all times borne true faith and allegiance to the Government of the United States, and have not in any way aided or abetted or given encouragement to rebellion against the said Government.

II. The Congress of the United States, by act of July 13, 1892 (known as the river and harbor act), made the following appropriation:

2 "For ship channel twenty and twenty-one feet in depth, and a minimum width of three hundred feet, in the shallows of and connecting waters of the Great Lakes between Chicago, Duluth, and Buffalo, three hundred and seventy-five thousand dollars: Provided, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to carry out the plans proposed by General O. M. Poe, Corps of Engineers, United States Army, dated January twentieth, eighteen hundred and ninety-one, and printed as House Executive Document, Numbered Two hundred and seven, second session Fifty-first Congress, for such ship channel, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate two million nine hundred and sixty-five thousand dollars, exclusive of the amount herein appropriated."

III. In response to advertisements, on behalf of the defendant and signed by O. M. Poe, colonel, Corps of Engineers, United States Army, inviting proposals for furnishing all labor, materials, and appliances and excavating a ship channel twenty and twenty-one feet deep, between Chicago in the State of Illinois, Duluth in the State of Minnesota, and Buffalo in the State of New York, as in the

preceding paragraph set forth and on the following sections into which said work was by said defendant divided:

"First section, Round Island Shoals.
Second section, Little Mud Lake.
Third section, Sailors' Encampment.
Fourth section, Mud Lake Shoal.
Fifth section, foot of Lake Huron.
Sixth section, St. Clair Flats.
Seventh section, Grossepoint Flats.
Eighth section, mouth of Detroit River."

3 Your petitioner submitted proposals for said work on said eighth section, which proposals were accepted, and a contract in writing for said work was, on the 31st day of December, 1892, duly entered into and signed by O. M. Poe, colonel, Corps of Engineers, United States Army, and by L. P. & J. A. Smith, and Louis P. Smith and James A. Smith, and said contract was on the 19th day of January, 1893, approved by Thomas Lincoln Casey, brigadier general, Chief of Engineers. A copy of said contract is hereto attached and marked Exhibit "A."

IV. Your petitioner, as soon as practicable and permitted after the execution of the contract between it and the defendant, proceeded to execute and carry out and perform the work embraced in the contract, and has executed, carried out, and performed all the work under said contract which it was permitted by the defendant, and as fast as it was permitted by the defendant to execute, carry out, and perform said work.

V. In the season of 1894, while working under said contract, toward the northerly end of said eighth section, your petitioner and the defendant discovered a natural bed of limestone rock called "Bar Point Rock Shoal," within the boundaries of the excavation called for by the contract, and which was a material not provided for by said contract to be removed, said contract calling only for the removal of "sand, clay, gravel, and boulders."

Whereupon a supplementary contract was ordered by the defendant to be entered into for the removal of said natural limestone bed rock, and in response to advertisements on the part of the defendant and signed by O. M. Poe, colonel, Corps of Engineers,

4 United States Army, inviting proposals for removing a shoal of bed rock and other material from section eight, of a ship channel between Chicago in the State of Illinois, Duluth in the State of Minnesota, and Buffalo in the State of New York. The L. P. & J. A. Smith Company, a corporation organized under the laws of the State of Ohio, successors in interest to said L. P. & J. A. Smith, submitted proposals for the said work which said proposals were accepted and a contract in writing for said work was, on the 9th day of November, 1894, duly entered into and signed by O. M. Poe, colonel, Corps of Engineers, United States Army, and by said The L. P. & J. A. Smith Company, by J. A. Smith, secretary and treasurer, duly authorized thereto, and said contract was on the 19th day

of November, 1894, duly approved by Geo. Lincoln Cully, brigadier general, Chief of Engineers, United States Army. Work under said contract was carried on and completed and a final estimate therefor made and paid for on the 16th day of July, 1895. A copy of said contract is hereto attached and marked Exhibit "B."

VI. On the completion of said contract above set forth, your petitioner resumed work under the first contract, above described at such points as the defendant from time to time directed, and excavated and removed "sand, clay, gravel, and boulders" until in the year 1897, when the defendant, through Geo. J. Lydecker, Lieut. Col., Corps of Engineers, U. S. Army, who had succeeded Colonel O. M. Poe on his death in 1896, and was in charge of said work for the defendant, ordered your petitioner to work at other certain particular points toward the northerly end of said section eight,
5 on what was known as other rock shoals, known respectively as Upper Rock Shoal, Middle Rock Shoal, and Hackett's Rock Shoal, which said shoals were not known to exist by either your petitioner or the defendant at the time the contracts above named were entered into, and also to do additional work on Bar Point Rock Shoal, excavated under the said second contract above set forth, that there existed at these points none of the material specified to be removed under the contract of December 31, 1892, above set forth, but the material to be excavated and removed therefrom was limestone bed rock, that your petitioner protested against being compelled to excavate and remove said material and demanded that an extra price be fixed for doing said additional work, but was forced by said Geo. J. Lydecker, Lieut. Col. Corps of Engineers, U. S. Army, engineer in charge of work for said defendant, to dredge on the various rock shoals above named, and to remove therefrom limestone bed rock under penalty, in case it refused so to do, of being declared defaulting contractor by the engineer in charge, who declared that in said event he would have the work done and the expense charged to your petitioner, the contractors, paying for it from the retained percentages in the defendant's hands due your petitioner for work already performed under said contract, and if said retained percentage was not sufficient to pay for said work, said contractors and their bond would be proceeded against.

That notwithstanding your petitioner was ordered by the said engineer in charge of said work not to remove bed rock, if found above grade in said section eight, but only "sand, clay, gravel, and boulders," your petitioner was nevertheless compelled by said
6 engineer in charge to remove limestone bed rock from said eighth section in the following amounts and figures, to wit:

	Cubic yards.
Bar Point Rock Shoal	11,117
Hackett's Rock Shoal	9,188
Middle Rock Shoal	3,992
Upper Rock Shoal	9,035
Total	33,332

that the fair market value for removing said limestone bed rock was $6.22½ per cubic yard.

VII. That upon the —— day of November, 1897, there was due and payable to the claimant, your petitioner, for limestone bed rock excavated up to and including October 19, 1897, the sum of $207,491.70. That payment of said sum so due was duly demanded but no part thereof was paid except the sum of $35,431.60, leaving a balance due and unpaid of $172,060.10.

VIII. Your petitioner also suffered damage by reason of loss of time sustained by its dredges, tugs, derricks, scows, and employees because the inspectors and agents of the defendant supervising the work were often compelled to go away to attend to other work, and while the said inspectors and agents of the defendant, who had supervision of said work on said section eight, and gave immediate instruction as to work for the dredges, derrick, scows, drills scow, etc., were otherwise engaged for the defendant, your petitioner was compelled to lie idle and lose time as it had no authority to do any work on said s'ction eight, without instructions from said inspectors and agents of the defendant, as follows, to wit:

7 Delays between Bar Point Rock Shoal and Bar Point Light House.

		hr.	min.
1896, August	11th	1	20
"	12th	4	30
"	13th	6	45
Sept.	28th	1	10
Oct.	2nd	4	45
"	3rd	1	40
"	5th	2	45
"	6th	3	30
"	7th	1	
"	8th	3	30
"	14th	4	
"	15th	9	30
"	16th	13	
"	17th	13	
"	19th	13	
"	20th	13	
"	23rd	13	
"	24th	13	
"	26th	13	
"	27th	13	
"	28th	13	
Nov.	2nd	13	
"	3rd	13	
"	4th	13	
"	5th	13	
"	9th	13	
"	10th	13	
"	11th	13	
"	13th	13	
"	14th	13	
"	17th	6	
"	20th	9	
"	21st	12	
Dec.	2nd	6	
"	3rd	5	

		hr.	min.		
8	1897, June 1st	2	30		
	June 19th	1	30		
	" 23rd	1			
	" 24th	5			
	" 25th			226 hr.	25 min.

Bar Point Rock Shoal.

1897, June	26th	1			
"	30th	1	30		
July	3rd	1	30		
"	13th	3	30		
"	14th	5			
"	15th	4	30		
"	16th	1		21 hr.	min.

Middle Rock Shoal.

1897, July	17th	4			
"	19th	3		7 hr.	min.

Gravel Shoal.

1897, August	2nd	7			
"	12th	2	30		
"	16th	4	30		
"	17th	4		18 hrs.	min.

Upper Rock Shoal.

1897, August	27th	1			
Sept.	10th	2			
Oct.	13th			30 3 hrs.	min.
				385 hrs.	55 min.

And your petitioner was damaged thereby in the sum of twenty-five dollars ($25) per hour for each and every hour of time so lost.

9 IX. That upon the 13th day of October, 1897, there was due and payable to the claimant, your petitioner, for damages sustained by reason of loss of time caused by defendant as above set forth the sum of $9,647.90. That payment of said sum so due was duly demanded, but no part thereof has been paid.

X. On the 10th day of February, 1897, said Lieut. Col. Geo. J. Lydecker, Corps of Engineers, U. S. A., engineer in charge of said work, advised said claimant that its contract first above described, was, by authority of the Chief of Engineers extended to July 1, 1897.

XI. Your petitioner further states that no assignment or transfer of said claim, or any portion thereof, has ever been made, and that your petitioner is justly entitled to the amounts above stated after allowing all said credits and off-sets. Money was appropriated by Congress inside the limit of expense above set forth, sufficient to pay the balance so as aforesaid claimed by your petitioner to be due.

Wherefore your petitioner prays judgment against the United States for the sum of $181,718, and for such additional amount as may be shown by the report of the engineers in charge of said work

to be justly due it on account of said work on said contract, together with interest thereon from the day on which said sum or sums became payable.

(Signed.) L. P. & J. A. SMITH,
By LOUIS P. SMITH.

FREDK. C. BRYAN,
Attorney for Claimant,
700 14th St. NW., Washington, D. C.

10 NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, *ss:*

Louis P. Smith, being first duly sworn, deposes and says that he is a member of L. P. & J. A. Smith, a partnership, which partnership is named as party claimant in the foregoing petition; that I have read said petition and known the contents thereof; and that the facts therein stated are true to the best of my knowledge, information, and belief.

(Signed.) LOUIS P. SMITH.

Subscribed and sworn to before me this 3d day of October, 1902.

(Signed.) WALTER D. MEALS,
United States Commissioner, Northern Dist. of Ohio.

Endorsed: No. 23,013, general jurisdiction. In the Court of Claims of the United States, L. P. & J. A. Smith, claimant, v. The United States. Petition filed Oct. 20, 1902. Court of Claims.

11 EXHIBIT "A."

(Form 18a.)

Advertisement.

U. S. ENGINEER OFFICE,
34 WEST CONGRESS STREET,
Detroit, Mich., November 9, 1892.

Sealed proposals for furnishing all labor, materials, and appliances, and excavating a ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, will be received at this office until 2 p. m., standard time, on the following dates, and then publicly opened:

For third section, Sailors' Encampment, on December 9, 1892.
For seventh section, Grossepoint Flats, on December 10, 1892.
For sixth section, St. Clair Flats, on December 12, 1892.
For eighth section, mouth of Detroit River, on December 13, 1892.
For second section, Little Mud Lake, on December 14, 1892.
For fifth section, foot of Lake Huron, on December 15, 1892.
For fourth section, Mud Lake Shoal, on December 16, 1892.
For first section, Round Island Shoals, on December 17, 1892.

Specifications, blank forms, and all available information will be furnished on application to this office.

Specifications—General Instructions for Bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as
12 printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the places and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposal will be considered unless accompanied by a guarantee in manner and form as directed in these instructions.

5. All bids and guarantees must be made in triplicate, upon printed forms to be obtained at this office.

6. The guaranty attached to each copy of the bid must be signed by two responsible guarantors, to be certified as good and sufficient by a judge of United States court, United States district attorney, collector of customs, or any other officer under the United States Government.

7. A firm will not be accepted as surety, nor will a partner be accepted as surety for a co-partner or for a firm of which he is a member. An officer of a corporation will not be accepted as surety for such corporation. Sureties must be citizens of the United States.

8. Each signature in proposals, guarantees, contracts, and bonds shall have affixed to them seals of wax, wafer, or other adhesive substance, and should be written out in full, and the signatures to the guarantees, contracts, and bonds should be attested by at least one witness, and when practicable by a separate witness to each signature.

9. Each guarantor, for each section, will justify in the sum named below for that section under the head of "Justification of guarantors." The liability of the guarantors and bidder is deter-
13 mined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed in the guarantee attached to the bid.

10. When firms bid, the individual names of members should be written out, and should be signed in full, giving the Christian names; but the signers may, if they choose, describe themselves in addition as doing business under a given name and style as a firm.

11. The place of residence of every bidder, and post-office address, with county and State, must be given after his signature.

12. All prices must be written as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office

on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid or to whom information in respect to proposals may have been given.

16. Any one signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any additions, limitations, or provisos attached to proposals will be liable to render them informal, and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If a bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent, unread.

14

20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item, will cause the rejection of all bids in which he is interested.

21. No bids received after the time set for opening of proposals will be considered.

22. The proposals and guarantees must be placed in a sealed envelope marked "Proposals for —— section, 20 and 21 Ft. Channel" (the blank to be filled with the number of the section bid upon), and inclosed in another sealed envelope addressed to Colonel O. M. Poe, Corps of Engineers, 34 West Congress Street, Detroit, Mich. The outer envelope must be so indorsed as to indicate before being opened the particular work for which the bid is made.

23. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

24. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in the amount stated below for each section under the head of "Justification," within ten (10) days after being notified of the acceptance of his proposal.

25. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

26. The sureties are to make and subscribe affidavits of justification on the back of the bond to the contract and they must jointly justify in double the amount of the penalty.

15 27. Bidders are invited to be present at the opening of the bids.

28. The channel is divided into eight separate and distinct sections. Bids will be considered separately for each section, and the contract for each will be awarded independently of the others. Bidders may submit proposals for one or more sections, but each bid for each section is to be made in triplicate, and on a separate set of blanks for proposals. Bids that do not conform to this requirement may be rejected on this account alone.

Work on each section shall be carried on as specified below under its own heading; and that part of the specifications under the heading "General conditions," will apply equally to each of the eight sections of the work.

General conditions.

29. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

30. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

31. Transfers of contracts, or of interests in contracts, are prohibited by law.

32. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

33. The decision of the engineer officer in charge as to quality and quantity shall be final.

34. Should the time for the completion of the work required for any "working season" be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor; provided, however, that if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, allow the contractor additional time in writing as pro-

16 vided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed; provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the Engineer Department of the Army.

35. Side slopes and depth of water.—Side slopes of two horizontal to one vertical will be required. Material excavated outside of these slopes will not be estimated nor paid for, unless such work is especially ordered in writing by the engineer officer in charge.

Whenever in the specifications "depth of water" is used, it shall be understood as referred to a water surface 21 feet above the prescribed bottom plane for the first, second, third, fourth, fifth, and eighth sections, and 20 feet above the prescribed bottom plane for the sixth and seventh sections.

36. Disposal of excavated material.—All excavated material shall be dumped at such places as may be designated by the U. S. agent in charge.

The intent of the specifications being to secure a continuous channel of the prescribed width, depth, etc., entirely across the obstructions, all material shoved into or deposited in any part of said channel, whether such part is included in these specifications or not, shall be removed by the contractor for the nearest section of the work at his own expense before the final estimate for his section is made.

37. Inspection.—The order of the work will be determined by the U. S. agent in charge, and his instructions shall be observed by the contractor and his employees. When required by the U. S. agent in charge the contractor shall, without additional compensation, furnish all necessary labor, materials, and appliances for placing and replacing suitable stakes and buoys for use in making surveys for estimates, and for marking the channel. He shall also, without additional compensation, furnish the use of a tug when needed
17 for towing the sounding rafts or scows, conveying engineers, inspectors, and other employees of the United States, and generally for all purposes connected with the inspection and supervision of the work. When required by the U. S. engineer in charge, all agents or inspectors of the United States employed on or about the work shall have meals and sleeping accommodations furnished by the contractor at a reasonable price, approved by the U. S. engineer in charge, and paid for by the United States.

All plant used shall be kept in good working condition. Each scow used shall be marked with a distinctive name or number, and whenever practicable it shall be loaded to its full capacity. Loads on deck scows or lighters will be measured separately, and partial loads in dump scows will be estimated, by the inspector, and his measurements and estimates, if approved by the engineer officer in charge, shall be final.

If any person employed by the contractor on any portion of the work shall appear to be incompetent or objectionable, he shall be discharged immediately upon the request of the U. S. agent in charge, and such person shall not again be employed upon any portion of the work.

In case of differences arising between the U. S. agent in charge and the contractor in regard to the work or to the specifications, appeal may be made to the engineer officer in charge.

38. Estimates.—Contingent upon such appropriations as may from time be made by law, and remittance made thereunder by the U. S. Treasury Department, payments will be made upon monthly estimates of the amount of material removed during the preceding

month, but ten per cent will be reserved from each payment until the completion of the contract.

The surveys for the final estimate will be made with bars suspended from a raft or scow, and, before final payment is made, all projections above the prescribed side slopes and bottom plane shall be removed.

39. Time.—Work shall be begun on or before May 15, 1893;
18 the total of the payments earned for excavation at the end of the first working season shall be at least one-fifth of the product obtained by multiplying the total estimated excavation required by the price bid per unit; at the end of the second working season, at least three-fifths of the same; and the work shall be entirely completed at the end of the third working season. In case any one of the above requirements is not fulfilled, the United States shall have the right to annul the contract and finish the work; and the contractor and his bondsmen shall be liable for any increase in cost over that proposed and agreed upon for the entire work as specified. In case the contract is annulled, as described above, all amounts that may be due to the contractor at the time will be forfeited to the United States.

Whenever in the specifications "working season" is used, it shall be understood as referring to that part of each year from May 15 to November 30, inclusive, a period of 200 days; but work is not restricted to that part of the calendar year.

Work shall not be carried on during Sundays and legal holidays, nor when there is so much sea that the inspectors lose control of the soundings, nor at night unless the contractor provide sufficient and suitable lights to enable the inspectors to control all portions of the work. With these exceptions work may be carried on at any time.

40. Sections for which contracts are awarded to same contractor.—Should contracts for more than one section be awarded to the same contractor, he shall have the privilege, subject to the approval of the engineer officer in charge, of concentrating his plant on one or more of such sections at a time. In such case the first paragraph under the head of time will be modified as follows:

For those sections for which contracts are awarded to the same contractor, work shall be begun on or before May 15, 1893; the total of the payments earned for excavation at the end of the first working season shall be at least one-fifth of the sum of the several products obtained by multiplying the total estimated excavation re-
19 quired for each of such sections by the price paid per unit for that section; at the end of the second working season, at least three-fifths of the same; the work on all such sections shall be entirely completed at the end of the third working season. In case any one of the above requirements is not fulfilled, the United States shall have the right to annul the contracts for all of such sections and finish the work; and the contractor and his bondsmen shall be liable for any increase in cost over that proposed and agreed upon for the entire work on each of such sections as specified. In case the con-

tracts be annulled as described above, all amounts that may be due to the contractor at the time will be forfeited to the United States.

With this modification the specifications shall apply with full force to each of the sections for which contracts are awarded to the same contractor.

41. Requirements in case funds become exhausted.—The river and harbor act of July 13, 1892, makes the following appropriation:

"For ship channel twenty and twenty-one feet in depth, and a minimum width of three hundred feet, in the shallows of the connecting waters of the Great Lakes between Chicago, Duluth and Buffalo, three hundred and seventy-five thousand dollars: Provided, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to carry out the plans proposed by General O. M. Poe, Corps of Engineers, United States Army, date January twentieth, eighteen hundred and ninety-one, and printed as House Executive Document, Numbered Two hundred and seven, second session Fifty-first Congress, for such ship channel, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate two million nine hundred and sixty-five thousand dollars, exclusive of the amount herein appropriated."

The amount of funds at any time available for work under the contract will be obtained by deducting from the total funds available for the 20 and 21 ft. channel, the estimated amounts necessary for all contingencies of engineering, superintendence, &c., &c.

20 In case the available funds became exhausted before the completion of the contract, the engineer officer in charge will give 30 days' written notice to the contractor that work may be suspended; but, if the contractor so elects, he may continue work under the conditions and restrictions of the specifications, after the time set by such notice, with the understanding, however, that no payments will be made for such work until additional funds have been provided in sufficient amount.

When additional funds become available for continuing the work, the engineer officer in charge will give 30 days' written notice to the contractor that work must be resumed.

The time lost by the contractor on account of exhaustion of available funds as determined by the above notices will be added to the times specified in paragraphs 39 or 40, as the case may be, for the completion of the various portions of the work. In computing this lost time, and in adding time to make up for it, that part of the calendar year that is not in the "working season" will be disregarded.

In case no additional funds become available within one calendar year, from the date prescribed by written notice by which work may be stopped, the percentage retained for work done prior to said date will be paid.

The processes above described will be repeated as often as the available funds become exhausted.

42. Information and responsibility.—All available information in the possession of the United States will be given upon application. The United States will not guarantee the correctness of its information and will not be responsible for the safety of the employees, plant, or materials used by the contractor, nor for any damage done by or to them from any source or any cause. Bidders are expected to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based upon a thorough understanding of its character. Intending bidders are urged to visit the localities of the work, and, by personal inspection and inquiry,
21 fully inform themselves as to the present and probable conditions. Navigation shall not be obstructed, and no allowance or concession will be made for any lack of information on the part of the contractor regarding the work. The price bid shall be full compensation for furnishing all necessary labor, materials, and appliances of every description, and for doing all work herein specified to the satisfaction of the engineer officer in charge, and shall include all risks and delays of whatever nature attending the execution of the work.

First section.

43. Location.—This section comprises the improvement of two shoals in St. Mary's River, Michigan, above the canal. The upper shoal lines northwesterly, and the lower shoal northeasterly from Old Round Island Lighthouse.

44. Character of work.—The work to be done consists in excavating a channel within the side and end lines prescribed by the U. S. agent in charge, said channel to have a bottom width of 300 feet, and a total length of about 3,000 feet, the estimated excavation being 90,000 cubic yards, bank measure, more or less. The greatest distance to the dumping ground will not exceed two miles, and the average distance will not exceed one mile.

45. Material.—The material to be removed consists of boulders, clay, sand, gravel, and possibly hardpan, all in unknown proportions.

46. Depth of excavation.—The bottom of the completed cut shall be in a plane 25.32 feet below the upper surface of the coping of the lock of 1881 in St. Mary's Falls Canal, the face of excavation probably varying from scraping to 5 feet.

47. Excess of excavation.—No payment will be made for excavation below 22 feet depth of water. All excavation within the specified side slopes and between 21 and 22 feet depth of water will be paid for at half rates in the final estimate.

48. Proposals and estimates.—Proposals will be received for
22 bank measurement only. For the monthly estimates 30 per cent will be deducted from scow measurements, but the total of the estimates made for the upper shoal will never exceed the total of the estimates made for the lower shoal, until all the required excavation has been finished at one of the shoals, and an equal amount of excavation has been done at the other.

Second section.

49. Location.—This section comprises the improvement of Little Mud Lake between the lower end of Sugar Island and the lower end of the "Dark Hole," St. Mary's River, Michigan.

50. Character of work.—The work to be done consists in excavating a channel within the side and end lines prescribed by the U. S. agent in charge, said channel to have a bottom width of 300 feet, and a length of about 18,500 feet, the estimated excavation being 380,000 cubic yards, bank measure, more or less. The greatest distance to the dumping ground will not exceed two miles, and the average distance will not exceed one mile.

51. Material.—The material to be removed consists of sand, gravel, boulders, and hard pan, all in unknown proportions.

52. Depth of excavation.—The bottom of the completed cut shall be in a plane 27 feet below the bench mark near Johnston's Dock, the face of excavation probably varying from scraping to 5½ feet; in the vicinity of the "Dark Hole," however, there is a small area where the face of excavation increases to about 15 feet.

53. Excess in excavation.—No payment will be made for excavation below 22 feet depth of water. All excavation within the specified side slopes and between 21 and 22 feet depth of water will be paid for at half rates in the final estimate.

54. Proposals will be received for bank measure only. For the monthly estimates 30 per cent will be deducted from scow measurements, but the U. S. agent in charge will establish and mark a cross section which will divide the required excavation into two nearly equal portions, and the total of the estimates made for work
23 above this cross section will never exceed the total of the estimates made for work below this cross section, until all of the required excavation has been finished on one side of this cross section, and an equal amount of excavation has been done on the other side.

Third section.

55. Location.—This section comprises the improvement of a reef abreast of Sailors' Encampment Island, St. Mary's River, Michigan.

56. Character of work.—The work to be done consists in excavating a channel between the side and end lines prescribed by the U. S. agent in charge, said channel to have a bottom width of 300 feet and a length of about 3,000 feet, the estimated excavation being 90,366 cubic yards, bank measure, more or less. The greatest distance to the dumping ground will not exceed two miles, and the average distance will not exceed one mile.

57. Material.—The material to be used consists mainly of limestone bed rock.

58. Depth of excavation.—The bottom of the completed cut shall be in a plane 27½ feet below the bench mark near Johnston's dock, the face of excavation probably varying from nothing to 14 feet.

59. Excess of excavation.—No payment will be made for excavation below 22 feet depth of water. All excavations within the specified side slopes and between 21 and 22 feet depth of water will be paid for at half rates in the final estimate.

60. Proposals and estimates.—Proposals will be received for bank measure only. For the monthly estimates 30 per cent will be deducted from scow measurements, but at the close of any working season the U. S. agent in charge may make a survey of the channel; in which case, if a greater excavation should be found than had previously been estimated, an estimate will be made of the excess, and payment therefor will be made; but, if a less excavation should be found than had previously been estimated, no subsequent estimates will be made until the deficiency has been made up.

24

Fourth section.

61. Location.—This section comprises the improvement of a shoal about one and one-half miles below Sailors' Encampment, in Mud Lake, St. Mary's River, Michigan.

62. Character of work.—The work to be done consists in excavating a channel between the side and end lines prescribed by the U. S. agent in charge; said channel to have a bottom width of 3,000 feet, and a length of about 4,000 feet, the estimated excavation being 67,000 cubic yards, bank measure, more or less. The greatest distance to the dumping ground will not exceed two miles, and the average distance will not exceed one mile.

63. Material.—The material to be removed consists of mud, sand, clay, and gravel, all in unknown proportions.

64. Depth of excavation.—The bottom of the completed cut shall be in a plane of 27½ feet below the bench mark near Johnston's dock, the face of excavation probably varying from scraping to 3½ feet.

65. Excess in excavation.—No payment will be made for excavation below 22 feet depth of water. All excavations below the specified side slopes and between 21 and 22 feet depth of water will be paid for at half rates in the final estimate.

66. Proposals and estimates.—Proposals will be received for bank measure only. For the monthly estimate 30 per cent will be deducted from scow measurement.

Fifth section.

67. Location.—This section comprises the improvement of a number of small shoals at the foot of Lake Huron.

68. Character of work.—The work to be done consists in excavating a channel between the side and end lines prescribed by the U. S. agent in charge; said channel to have a bottom width of 2,400 feet, and a length of about 6,000 feet, the estimated
25 excavation being 256,000 cubic yards, scow measure, more or

less. The greatest distance to the dumping ground will not exceed two miles, and the average distance will not exceed one mile.

69. Material.—The material to be removed consists of sand, clay, gravel, boulders, and probably hard pan, all in unknown proportions.

70. Depth of excavation.—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 4 feet.

71. Excess in excavation.—No payment will be made for excavation below 21½ feet depth of water, but the contractor may excavate to that depth to secure a depth of water 21 feet.

72. Pile clusters.—Until the completion of the contract, the contractor, without additional compensation, shall, when required by the U. S. agent in charge, furnish all necessary labor, materials, and appliances for establishing, maintaining, and lighting three pile clusters for marking the channel. Each of said clusters shall be composed of not more than six piles, securely bound together as required by the U. S. agent in charge, and shall be located as prescribed by him. If required, the contractor shall, without additional compensation, completely remove all of these pile clusters before final payment is made.

73. Proposals.—Proposals will be received for scow measure only.

Sixth section.

74. Location.—This section comprises the improvement of St. Clair Flats, Michigan.

75. Character of work.—The work to be done consists in excavating a channel between the side and end lines prescribed by the U. S. agent in charge; said channel to begin at the deep water of St. Clair River, above St. Clair Flats Canal, with a bottom width of not more than 650 feet; hence gradually narrowing to the canal, a
26 length of about 3,000 feet; hence for the full width of the canal through its entire length, about 7,200 feet; hence gradually widening to a bottom width of not more than 800 feet at the deep water of Lake St. Clair, a further length of about 17,000 feet; the total length being about 27,200 feet, and the estimated excavation being 950,000 cubic yards, scow measure, more or less. The greatest distance to the dumping ground will not exceed three miles, and the average distance will not exceed two miles.

76. Material.—The material to be removed consists of clay and sand, in unknown proportions.

77. Depth of excavation.—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 6 feet, but where the channel has already been improved the face of excavation will probably average 2 feet.

78. Excess in excavation.—No payment will be made for excavation below 20½ feet depth of water, but the contractor may excavate to that depth to secure a depth of water of 20 feet.

79. Use of piers.—A limited portion of the piers of St. Clair Flats Canal, the location and area to be designated from time to time by the U. S. agent in charge, will be reserved to the contractor for the storage of fuel and for the placing and preparing of materials. The contractor shall repair all damage done to such portion of the piers, so that it will be as good when his contract is completed as when first reserved to him.

80. Pile clusters.—Two pile clusters may be required by the U. S. agent in charge. They shall conform to all the conditions and requirements of those for the fifth section, as specified in paragraph 72.

81. Proposals.—Proposals will be received for scow measure only.

Seventh section.

82. Locations.—This section comprises the improvement of Grosse-point Flats, Lake St. Clair, Michigan.

27 83. Character of work.—The work to be done consists in excavating a channel within the side and end lines prescribed by the U. S. agent in charge; said channel to have a minimum width at bottom of 300 feet, and a length of about 29,000 feet, but the engineer officer in charge may require the bottom width to be increased to not more than 800 feet, if the price bid so warrants; the estimated excavation for the width of 300 feet being 1,200,000 cubic yards, scow measure, more or less, and for the width of 800 feet, 2,900,000 cubic yards, scow measure, more or less. The greatest distance to the dumping ground will not exceed three miles, and the average distance will not exceed two miles.

84. Material.—The material to be removed consists of clay, gravel, sand, and some boulders, with possibly some hard pan.

85. Depth of excavation.—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 6 feet.

86. Excess in excavation.—No payment will be made for excavation below 20½ feet depth of water, but the contractor may excavate to that depth to secure a depth of water of 20 feet.

87. Pile clusters.—Three pile clusters may be required by the U. S. agent in charge. They shall conform to all the conditions and requirements of those for the fifth section, as prescribed in paragraph 72.

88. Proposals and estimates.—Proposals will be received for scow measure only. Until a channel of the prescribed depth and of a bottom width of 300 feet has been completed entirely across the obstruction, no estimates will be made for excavation outside of such channel. The final bottom width of the channel will be announced before the contract is signed, and the estimated excavation for that width will be proportionate to that for the width of 300 feet, and that for the width of 800 feet, as given in paragraph 83. This proportionate amount will be used in applying paragraphs 39 and 40.

28 — Eighth section.

89. Location.—This section comprises the improvement of the bar at the mouth of Detroit River.

90. Character of work.—This work to be done consists in excavating a channel within the side and end lines prescribed by the U. S. agent in charge; said channel to have a minimum width at bottom of 300 feet and a length of about 26,500 feet, but the engineer officer in charge may require the bottom width to be increased to not more than 800 feet, if the price bid so warrants; the estimated excavation for the width of 300 feet being 411,000 cubic yards, scow measure, more or less, and for the width of 800 feet 1,086,000 cubic yards, scow measure, more or less. The greatest distance to the dumping ground will not exceed three miles, and the average distance will not exceed two miles.

91. Material.—The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions.

92. Depth of excavation.—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 4 feet.

93. Excess in excavation.—No payment will be made for excavation below 21½ feet depth of water, but the contractor may excavate to that depth to secure a depth of water of 21 feet.

94. Pile clusters.—Three pile clusters may be required by the U. S. agent in charge. They shall conform to all conditions and requirements of those for the fifth section, as specified in paragraph 72.

95. Proposals and estimates.—Proposals will be received for scow measure only. Until a channel of the prescribed depth and of a bottom width of 300 feet has been completed entirely across the obstructions, no estimates will be made for excavation outside of such channel. The final bottom width of the channel will be announced before the contract is signed, and the estimated excavation for that width will be proportionate to that for the width of 300 feet, and that for the width of 800 feet as given in paragraph 90. This proportionate amount will be used in applying paragraphs 39 and 40.

29 Proposals.

---------- 1892.

To Colonel O. M. Poe,

Corps of Engineers, U. S. A., Detroit, Mich.

Sir: In accordance with your advertisement of November 9, 1892, inviting proposals for excavation, etc., for ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, and subject to all of the conditions and requirements thereof, and of your instructions and specifications, dated November 9, 1892, copies of all of which are hereto attached, and, so far as they relate to this proposal, are made a part of it.

We (or) I propose to furnish all labor, materials, and appliances, and to excavate and remove the material, etc., as specified, at the following price:

First section.—For all material above a 21-foot grade, removed and deposited as specified, for the sum of ---------- cents (---- cts.) per cubic yard of excavation, bank measure.

Second section.—For all material above a 21-foot grade, removed and deposited as specified, for the sum of ---------- cents (---- cts.) per cubic yard of excavation, bank measure.

Third section.—For all material above a 21-foot grade, removed and deposited as specified, for the sum of ---------- dollars ($----) and ---------- cents (---- cts.) per cubic yard of excavation, bank measure.

Fourth section.—For all material above a 21-foot grade, removed and deposited as specified, for the sum of ---------- cents (---- cts.) per cubic yard of excavation, bank measure.

Fifth section.—For all material above a 21-foot grade, removed and deposited as specified, for the sum of ---------- cents (---- cts.) per cubic yard of excavation, scow measure.

Sixth section.—For all material above a 20-foot grade, removed and deposited as specified, for the sum of ---------- cents (---- cts.) per cubic yard of excavation, scow measure.

Seventh section.—For all material above a 20-foot grade, removed and deposited as specified, for the sum of ---------- cents (---- cts.) per cubic yard of excavation, scow measure.

Eighth section.—For all material above a 21-foot grade, removed and deposited as specified, for the sum of eighteen cents (18 cts.) per cubic yard of excavation, scow measure.

We (or) I make this proposal with a full knowledge of the kind, quantity, and quality of the work required, and, if it is accepted, will, within the space of ten (10) days after being notified of such acceptance, enter into contract, with good and sufficient sureties, for the faithful performance thereof.

Witness:

Signature. LOUIS P. SMITH. [SEAL.]

----------Address ----------

Signature. JAMES A. SMITH. [SEAL.]

Address. L. P. & J. A. SMITH. [SEAL.]

(Signed in triplicate.)

Notice.—Each bid for each section is to be made in triplicate, and on a separate set of blanks for proposals. Bids that do not conform to this requirement may be rejected on this account alone.

Guaranty.

We ---------- of ----------, in the State of ---------- and ---------- of ----------in the State of ---------- hereby guarantee

and bind ourselves and each of us, our and each of our heirs, executors, and administrators, to the effect that if the bid of .....
.....
.....
.....
.....

..... herewith accompanying, dated ..... 1892, for
31 excavation, etc., for ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, shall be accepted in whole or in part, within sixty (60) days from the date of the opening of proposals, the said bidder ..... will, within ten (10) days after being notified of such acceptance, enter into a contract with the United States in accordance with the terms and conditions of the advertisement, and will give bond with good and sufficient sureties for the faithful and proper fulfillment of the same. And in case the said bidder ..... shall fail to enter into contract within the said ten (10) days with the proper officer of the United States, and furnish good and sufficient bond for the faithful performance of the same according to the terms of said bid and advertisement, we and each of us hereby stipulate and guarantee, and bind ourselves and each of us, our and each of our heirs, executors, and administrators to pay unto the United States the difference in money between the amount of the bid of the said bidder ..... and the amount for which the proper officer of the United States may contract with another party to do the specified excavation, etc., for ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, if the latter amount be in excess of the former, for the whole work covered by the proposal.

..... [SEAL.]
..... [SEAL.]

Witnesses:

.....
.....

Dated ..... 1892.
(Executed in triplicate.)

Justification of guarantors.

Notice.—The blank spaces * are to be filled in as follows:
For first section, "Thirty thousand dollars."
For second section, "Thirty thousand dollars."
For third section, "Seventy-five thousand dollars."
For fourth section, "Six thousand dollars."
32 For fifth section, "One hundred thousand dollars."
For sixth section, "Seventy thousand dollars."
For seventh section, "Two hundred thousand dollars."
For eighth section, "Two hundred thousand dollars."

STATE OF ----------,
County of ----------, ss:

I, ----------, one of the guarantors named in the within guaranty, do swear that I am pecuniarily worth the sum of $---------- dollars, over and above all my debts and liabilities.

(Signature of guarantor.)

Before me,

(Signature of officer administering oath, with seal, if any.)

STATE OF ----------,
County of ----------, ss:

I, ----------, one of the guarantors named in the within guaranty, do swear that I am pecuniarily worth the sum of $---------- dollars, over and above all my debts and liabilities.

(Signature of guarantor.)

Before me,

(Signature of officer administering oath, with seal, if any.)

Certificate.

I, ---------- do hereby certify that ----------, and ----------, the guarantors named, are personally known to me, and that, to the best of my knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

(Signature of certifying official.)

Note.—The certificate may be given separately as to each guarantor, and modified accordingly.

(Form 19.)

Articles of agreement entered into this 31 day of December, eighteen hundred and ninety-two (1892), between Colonel O. M. Poe, Corps of Engineers, U. S. Army, of the first part, and Louis P. Smith and James A. Smith, partners, doing business under the firm name of L. P. & J. A. Smith, of Cleveland, of the county of Cuyahoga, State of Ohio, of the second part:

This agreement witnesseth that, in conformity with the advertisement and specification hereunto attached, and which form a part of

this contract, the said Colonel O. M. Poe, for and in behalf of the United States of America, and the said L. P. & J. A. Smith for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

That the said L. P. & J. A. Smith shall furnish all labor, materials, and appliances, and shall excavate and remove the material, &c., as specified, for the width of 800 feet, for a ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, located in the eighth section, mouth of Detroit River, and shall receive in full compensation therefor at the rate of eighteen cents (18) per cubic yard of excavation, scow measure.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be
34 rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said L. P. & J. A. Smith shall commence and complete the work as specified.

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor, legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, That if the party (or parties) of the second part shall by freshets, ice, or other force of violence of the elements, by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

35 If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quality, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentages retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sum may be expended by the party of the

36 first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said L. P. & J. A. Smith, as specified when the work contracted for shall have been delivered and accepted, reserving ten per cent. from each payment until the whole work shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said L. P. & J. A. Smith to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by said L. P. & J. A. Smith, are reserved to the United States.

No Member of or Delegate to Congress nor any person belonging to or employed in the military service of the United States is or

shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

Witnesses:

(Signed.) C. S. SHAMROTH,
C. H. W. BOLINGBROKE,
H. J. POSSITER, [SEAL.]
O. M. POE, [SEAL.]
Colonel, Corps of Engineers, U. S. Army.

LOUIS P. SMITH,
JAMES A. SMITH,
L. P. & J. A. SMITH. [SEAL.]

(Executed in quintuplicate.)

Approved Jan. 19, 1893.

THOS. LINCOLN CASEY,
Brig. Gen., Chief of Engineers.

37 †I do solemnly swear that the foregoing is an exact copy of a contract made by me personally with_____, that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said _____ or any other persons; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

_____,
Corps of Engineers.

Subscribed and sworn to before me this_____ day of _____.

_____
_____

*Note.—Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract." See sec. 3740, Revised Statutes.

†Note.—The affidavit is required only on the quintuplicate copy of contract intended for the returns office, Department of the Interior. A. R., 669.

Note.—The copy of contract for the bureau must be accompanied with an abstract of the bids, and copy of each bid and advertisement, unless previously furnished. See also A. R., 655.

Note.—See Circular No. 18, O. C. of E., Oct. 18, 1887. See also Circ. No. 10, O. C. of E., Aug. 3, 1889.

38 EXHIBIT "B."

Advertisement.

U. S. ENGINEER OFFICE,
34 WEST CONGRESS ST.,
Detroit, Mich., August 23, 1894.

Sealed proposals for furnishing all labor, materials, and appliances, and removing a shoal or bed rock and other material from section 8, ship channel between Chicago, Duluth, and Buffalo, will be received here until 2 p. m., standard time, September 22, 1894, and then publicly opened. All information furnished on application.

O. M. POE,
Col. Corps of Engineers.

Specification.—General instructions for bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. A map of the locality may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposal will be considered unless accompanied by a guarantee in manner and form as directed in the instructions.

39 5. All bids and guarantees must be made in triplicate, upon printed forms to be obtained at this office.

6. The guaranty attached to each copy of the bid must be signed by two responsible guarantors, to be certified as good and sufficient guarantors by a judge of the United States court, United States district attorney, collector of customs, or any other officer under the United States Government.

7. A firm will not be accepted as surety, nor will a partner be accepted as surety for a co-partner or for a firm of which he is a member. An officer of a corporation will not be accepted as surety for such corporation. Sureties must be citizens of the United States.

8. Each signature in proposals, guarantees, contracts, and bonds shall have affixed to them seals of wax, wafer, or adhesive substance, and should be written out in full, and the signatures to the guaran-

tees, contracts, and bonds should be attested by at least one witness, and when practicable by a separate witness to each signature.

9. Each guarantor will justify in the sum of fifteen thousand dollars ($15,000). The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed in the guarantee attached to the bid.

10. When firms bid, the individual names of members should be written out, and should be signed in full, giving the Christian names; but the signers may, if they choose, describe themselves in addition as doing business under a given name and style as a firm.

11. The place of residence of every bidder, and post-office address, with county and State, must be given after his signature.

12. All prices must be written, as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

14. Proposals must be prepared without assistance from any person employed in or belong to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid or to whom information in respect to proposals may have been given.

16. Any one signing the proposal as the agent of another, or others, must file with it legal evidence of his authority to do so.

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal, and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If a bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent, unread.

20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

21. No bids received after the time set for opening of proposals will be considered.

22. The proposals and guarantees must be placed in a sealed envelope marked "Proposals for removing a shoal in the mouth of Detroit River, section 8, of the 20 and 21 Ft. Channel," and inclosed in another sealed envelope addressed to Col. O. M. Poe, Corps of Engineers, 34 West Congress Street, Detroit, Mich. The outer

envelope must be so endorsed as to indicate before being opened the particular work for which the bid is made.

41 23. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

24. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in amount not greater than one-fourth nor less than one-fifth the amount of the bid, within ten (10) days after being notified of the acceptance of his proposal.

25. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

26. The sureties are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must jointly justify in double the amount of the penalty.

27. Bidders are invited to be present at the opening of the bids.

General conditions.

28. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

29. The contractor should, within ten days from the award of the contract, furnish the office with the post office address to which communications should be sent.

30. Transfers of contracts, or of interests in contracts, are prohibited by law.

31. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

32. The decision of the engineer officer in charge as to quality and quantity shall be final.

42 33. Should the time for the completion of the work be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor: Provided, however, That if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed: Provided further, That nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in

the form of contract adopted and in use by the Engineer Department of the Army.

34. Side slopes and depth of water.—Side slopes of two horizontal to one vertical will be re'uired. Material excavated outside of these slopes will not be estimated nor paid for, unless such work is especially ordered in writing by the engineer officer in charge.

Whenever in the specifications "depth of water" is used, it shall be understood as referred to a water surface 21 feet above the prescribed bottom plane for the eight section ship channel between Chicago, Duluth, and Buffalo.

35. Disposal of excavated material.—All excavated material shall be dumped at such places as may be designated by the U. S. agent in charge. The average distance to the dumping ground will not exceed two miles.

The intent of the specifications being to secure a continuous channel of the prescribed width, depth, etc., entirely across the obstructions, all material shoved into or deposited in any part of said channel, whether such part is included in these specifications or not, shall be removed by the contractor for the work at his own expense before the final estimate is made.

43 36. Inspection.—The order of the work will be determined by the U. S. agent in charge, and his instructions shall be observed by the contractor and his employees. When required by the U. S. agent in charge, the contractor, shall, without additional compensation, furnish stakes and buoys for use in making surveys for estimates, and for making the channel, and all labor, materials, and appliances required for placing and replacing them. He shall also, without additional compensation, furnish the use of a tug when needed for towing the sounding rafts or scows, conveying engineers, inspectors, and other employees of the United States, and generally for all purposes connected with the inspection and supervision of the work. When required by the U. S. engineer in charge, all agents or inspectors of the United States employed on or about the work shall have meals and sleeping accommodations furnished by the contractor at a reasonable price, approved by the engineer officer in charge, and paid for by the United States.

All plant used shall be kept in good working condition. Each scow used shall be marked with a distinctive name or number, and whenever practicable it shall be loaded to its full capacity. Loads on deck scows or lighters will be measured separately, and partial loads in dump scows will be estimated by the inspector, and his measurements and estimates, if approved by the engineer officer in charge, shall be final.

If any person employed by the contractor on any portion of the work shall appear to be incompetent or objectionable, he shall be discharged immediately upon the request of the U. S. agent in charge, and such person shall not again be employed upon any portion of the work.

In case of differences arising between the U. S. agent in charge and the contractor in regard to the work or to the specifications, appeal may be made to the engineer officer in charge.

37. Estimates.—Contingent upon such appropriations as may from time to time be made by law, and remittances made thereunder by the U. S. Treasury Department, payments will be made upon
44 monthly estimates of the amount of material removed during the preceding month, but ten per cent will be reserved from each payment until the completion of the contract.

The surveys for the final estimate will be made with bars suspended from a raft or scow, and, before final payment is made, all projections above the prescribed side slopes and bottom plane shall be removed.

38. Time.—Work shall be begun on or before October 1, 1894, and completed on or before September 1, 1895. In case any one of the above requirements is not fulfilled, the United States shall have the right to annul the contract and finish the work; and the contractor and his bondsmen shall be liable for any increase in cost over that proposed and agreed upon for the entire work as specified. In case the contract be annulled, as described above, all amounts that may be due to the contractor at the time will be forfeited to the United States.

Work shall not be carried on during Sundays and legal holidays, nor when there is so much sea that the inspectors lose control of the soundings, nor at night unless the contractor provide sufficient and suitable lights to enable the inspectors to control all portions of the work. With these exceptions work may be carried on at any time.

39. Requirements in case funds become exhausted.—The river and harbor act of July 13, 1892, makes the following appropriation:

"For ship channel twenty and twenty-one feet in depth, and a minimum width of three hundred feet, in the shallows of the connecting waters of the Great Lakes between Chicago, Duluth, and Buffalo, three hundred and seventy-five thousand dollars: Provided, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to carry out the plans proposed by General O. M. Poe, Corps of Engineers, United States Army, date January twentieth, eighteen hundred and ninety-one, and printed as House Executive Document, Numbered Two hundred and seven, second session Fifty-first Congress, for such ship
45 channel, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate two million nine hundred and sixty-five thousand dollars, exclusive of the amount herein appropriated."

The amount of funds at any time available for work under the contract will be obtained by deducting from the total funds available for the 20 and 21-foot channel, the estimated amounts necessary for all contingencies of engineering, superintendence, etc., etc.

In case the available funds become exhausted before the completion of the contract, the engineer officer in charge will give 30 days' written notice to the contractor that work may be suspended; but, if the contractor so elects, he may continue work under the conditions and restrictions of the specifications, after the time set by such notice, with the understanding, however, that no payments will be made for such work until additional funds have been provided in sufficient amount.

When additional funds become available for continuing the work, the engineer officer in charge will give 30 days' written notice to the contractor that work must be resumed.

Time lost by the contractor on account of exhaustion of available funds as determined by the above notices will be added to the time specified in paragraph 38 for the completion of the work. In computing this lost time, and in adding time to make up for it, that part of the calendar year that is not in the "working season" will be disregarded.

In case no additional funds become available within one calendar year from the date prescribed by written notice on which work may be stopped, the percentages retained for work done prior to said date will be paid.

The processes above described will be repeated as often as the available funds become exhausted.

40. Information and responsibility.—All available information in the possession of the United States will be given upon application. The United States will not guarantee the correctness of its information and will not be responsible for the safety of the em-
46 ployees, plant, or materials used by the contractor, or for any damage done by or to them from any source or any cause. Bidders are expected to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based upon a thorough understanding of its character. Intending bidders are urged to visit the locality of the work, and, by personal inspection and injury, fully inform themselves as to the present and probably future conditions. Navigation shall not be obstructed, and no allowances or concessions will be made for any lack of information on the part of the contractor regarding the work. The price bid shall be full compensation for furnishing all necessary labor, materials, and appliances of every description, and for doing all work herein specified to the satisfaction of the engineer officer in charge, and shall include all risks and delays of whatever nature attending the execution of the work.

41. Location.—The shoal to be removed is in the mouth of Detroit River, on the Hacket Range and about 9,300 feet below Bois Blanc Lighthouse.

42. Character of work.—The work to be done consists in excavating a channel about 800 feet in length and 400 feet in width, to a clear depth of 21 feet below the datum plane established for section 8, ship channel. The estimated excavation above the 21-foot plane is

5,000 cubic yards, of bed rock, bank measure, and about 267 cubic yards, scow measure, of material other than bed rock. The estimated amount of bed rock, bank measure, between the 21 and 22 foot planes is 6,202 cubic yards.

43. Face of excavation.—The face of excavation varies from scraping to about 4 feet. The bed rock will be measured in place, the material other than bed rock will be measured in scows.

44. Excess of excavation.—No payment will be made for excavation below 22 feet depth of water. All excavation within the specified side slopes and between 21 and 22 feet depth of water, will be paid for at half rates in the final estimates.

47 45. Proposals and estimates.—Proposals will be received for bank measure only for the bed rock excavation and for scow measure only for the excavation other than bed rock. For the monthly estimates for bed rock excavation 30 per cent will be deducted from scow measurements, but at the end of any month, the U. S. agent in charge may make a survey of the channel; in which case if a greater excavation should be found than had previously been estimated, an estimate will be made of the excess, and payment therefore will be made; but, if a less excavation should be found than had previously been estimated, no subsequent estimates will be made until the deficiency has been made up.

46. Lighting.—The contractor will be required, at his own expense, to keep two conspicuous lights at night, and two floats during the day, anchored over the work, at such localities as the United States engineer in charge shall direct. Should the contractor fail to comply with this clause, the engineer officer in charge, or his agent, shall have the right to procure, at the contractor's expense, the necessary men and material to comply with it.

47. Storing explosives.—Upon the application of the contractor the United States engineer, or his agent in charge, will locate a point in the Detroit River where the contractor can store explosives, not to exceed the amount of 600 pounds.

The contractor shall not keep on the work a greater amount of explosives than one day's supply.

Proposal.

----------, 1894.

To Colonel O. M. Poe,
Corps of Engineers, U. S. A., Detroit, Mich.

Sir: In accordance with your advertisement of August 23, 1894, inviting proposals for removing a shoal in section 8 of the ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, and subject to all the conditions and requirements thereof, and of your instructions and specifications, dated August 23, 1894,

48 copies of all of which are hereto attached, and so far as they relate to this proposal, are made a part of it.

We (or) I propose to furnish all labor, materials, and appliances, and to excavate and remove the material, etc., as specified, at the following price:

For all bed rock above a 21-foot grade, removed and deposited as specified, for the sum of two dollars ($2.00) and twenty-four cents (24 cts.) per cubic yard of excavation, bank measure.

For all material other than bed rock above a 21-foot grade, removed and deposited as specified, for the sum of ninety-five cents (95 cts.) per cubic yard of excavation, scow measure.

We (or) I make this proposal with a full knowledge of the kind, quantity, and quality of the work required, and if it is accepted, will, within the space of ten (10) days after being notified of such acceptance, enter into contract, with good and sufficient sureties, for the faithful performance thereof.

Witness:

(Signature)
THE L. P. & J. A. SMITH CO., [SEAL.]
By J. A. SMITH,
(Address)
(Signature)
Secretary and Treas. [SEAL.]
(Address)
(Signature) [SEAL.]
(Address)
(Signature) [SEAL.]
(Address)
(Signature) [SEAL.]
(Address)

(Signed in triplicate.)

Guaranty.

We, Patrick Smith, of Cleveland, in the State of Ohio, and G. C. Barnes, of Cleveland, in the State of Ohio, hereby guarantee and bind ourselves and each of us, our and each of our heirs, ex-
49 ecutors, and administrators, to the effect that if the bid of The L. P. & J. A. Smith Co., herewith accompanying, dated 22d September, 1894, for removing a shoal in section 8 of the ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, shall be accepted, on whole or in part, within sixty (60) days from the date of the opening of proposals, the said bidder, The L. P. & J. A. Smith Company will, within ten (10) days after being notified of such acceptance, enter into a contract with the United States, in accordance with the terms and conditions of the advertisement, and will give bond with good and sufficient sureties for the faithful and proper fulfillment of the same. And in case the said bidder shall fail to enter into contract within the said ten (10) days with the proper officer of the United States, and furnish good and sufficient bond for

the faithful performance of the same, according to the terms of said bid and advertisement, we and each of us hereby stipulate and guarantee, and bind ourselves and each of us, our and each of our heirs, executors, and administrators, to pay unto the United States the difference in money between the amount of the bid of the said bidder, and the amount for which the proper officer of the United States may contract with another party to do the specified work, if the latter amount be in excess of the former, for the whole work covered by the proposal.

PATRICK SMITH. [SEAL.]
G. C. BARNES. [SEAL.]

Witness:
JOHN R. SEMPLE,
ARTHUR MCMAHON.
Dated ....., 1894.
(Executed in triplicate.)

Justification of guarantors.

STATE OF OHIO,
County of Cuyahoga, ss:

I, Patrick Smith, one of the guarantors named in the within guaranty, do swear that I am pecuniarily worth the sum of fifteen thousand dollars, over and above all debts and liabilities.

(Signature of guarantor.)

PATRICK SMITH. [SEAL.]

Before me,
(Signature of officer administering oath with seal, if any.)
[SEAL.] C. W. H. BOLINGBROKE,
Notary Public.

STATE OF OHIO,
County of Cuyahoga, ss:

G. C. Barnes, one of the guarantors named in the within guaranty, do swear that I am pecuniarily worth the sum of fifteen thousand dollars, over and above all my debts and liabilities.

(Signature of guarantor.)

G. C. BARNES. [SEAL.]

Before me,
(Signature of officer administering oath with seal, if any.)
[SEAL.] C. W. H. BOLINGBROKE,

Certificate.

I, Leonard Lutz, do hereby certify that Patrick Smith, and G. C. Barnes, the guarantors above named, are personally known to me, and that to the best of my knowledge and belief, each is pecuniarily

worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

(Signature of certifying official.)

LEONARD LATTE,
Deputy Collector of Customs.

Note.—The certificate may be given separately as to each guarantor, and modified accordingly.

(Form 19.)

Articles of agreement entered into this 9th day of November,
51 eighteen hundred and ninety-four (1894), between Colonel O. M. Poe, Corps of Engineers, U. S. Army, of the first part, and The L. P. & J. A. Smith Co., by J. A. Smith, secretary and treasurer, an incorporated company, of Cleveland, of the county of Cuyahoga, State of Ohio, of the second part:

This agreement witnesseth that, in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said Colonel O. M. Poe for and in behalf of the United States of America, and the said The L. P. & J. A. Smith Co. for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

That the said The L. P. & J. A. Smith Co. shall furnish all labor, materials, and appliances and remove a shoal in section 8 of the ship channel between Chicago, Duluth, and Buffalo, at the following prices:

For all bed rock above a 21-foot grade, removed and deposited as specified, the sum of two dollars and twenty-four cents ($2.24) per cubic yard of excavation, bank measure.

For all material other than bed rock above a 21-foot grade, removed and deposited as specified, the sum of ninety-five cents (95c.) per cubic yard of excavation, scow measure.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decisions of the engineer officer in charge as to quality shall be final.

The said The L. P. & J. A. Smith Co. shall commence and complete the work as specified.

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of
52 the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice

in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of such contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, That if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contact, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writ-
53 ing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the qualities and price of both material and labor this substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claims whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specially included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as

specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages done to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the s'cond part for completing the same.

Payments shall be made to the said The L. P. & J. A. Smith Co. as specified when the work contracted for shall have been delivered and accepted, reserving ten per cent. from each payment until the whole work shall have been so delivered and accepted.

54 Neither this contract nor any interest therein shall be transferred by the said The L. P. & J. A. Smith Co. to any other party; and any such transfer shall cause the annulment of this contract so far as the United States are concerned.

All rights of action, however, to recover for any breach of this contract by the said The L. P. & J. A. Smith Co. are reserved to the United States.

No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom. But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

Witnesses:

C. SCHANROTH.

[SEAL.] O. M. POE,
Colonel, Corps of Engineers, U. S. A.
THE L. P. & J. A. SMITH CO.,
By J. A. SMITH,
Secretary and Treasurer.

C. W. H. BOLINGBROKE.

(Executed in quintuplicate.)

Approved November 19, 1894.

(Signed.) GEO. LINCOLN CULLY,
Brig. Gen., Chief of Engineers.

I do solemnly swear that the foregoing is an exact copy of a contract made by me personally with ----------

55 that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ---------- or any other person; and that

the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

---;

Corps of Engineers.

Subscribed and sworn to before me this ---- day of ----

II. General Traverse.

Court of Claims.

L. P. & J. A. Smith,
vs.
The United States.
No. 23013.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

56 III. Amendment to Petition. Filed by Leave of Court April 14, 1919.

Now comes the claimant and respectfully moves this honorable court for leave to file an amendment to the petition filed herein, in the following particulars, to wit:

(1) That claimant be permitted to strike out the figures "$35,431.60" found on page 6, paragraph four, of the petition and substitute therefore the figures "$5,999.76."

(2) That claimant be permitted to strike out the figures "$172,060.10" found in the last line of paragraph four on page 6 of the petition, and substitute therefore the figures "$201,491.94."

(3) That claimant be permitted to strike out the figures "$181,718," found in the second line of the prayer of the petition on page 9, and substitute therefore the figures "$211,139.84."

In support of the above motion claimant says that the foregoing amendment is necessary to have the pleadings conform to the proof and to rectify a clerical error made in the drafting of the original petition herein.

The claimant further respectfully asks that the foregoing motion be heard at the same time that the case is tried on its merits.

L. P. & J. A. Smith,
By Rufus S. Day,
Attorney for Claimants.

I hereby acknowledge service of the filing of the foregoing motion and consent to the filing of the same.

March 5, 1919.

Wm. L. Frierson,
Attorney for the United States.

No objection.

H. D. Jacob.

57 IV. SUBSTITUTION OF ATTORNEY.

On January 22, 1919, on motion made therefor, with accompanying power of attorney, Rufus Day, Esq., was substituted as attorney of record, the present attorney (Frederick C. Bryan) consenting thereto. On the same day Roscoe M. Ewing, Esq., was entered of counsel at the request of Mr. Day, attorney of record.

V. ARGUMENT AND SUBMISSION OF CASE.

On March 18, 1919, this case was argued and submitted on merits and on the claimants' motion for leave to file amendment to the petition by Messrs. Rufus S. Day and Roscoe M. Ewing, for the claimants, and by Mr. Harvey D. Jacob, for the defendants.

Note.—The amendment above referred to was allowed to be filed April 14, 1919, and can be found on page 56 of this record.

58 VI. FINDINGS OF FACT, CONCLUSION OF LAW, AND MEMORANDUM. ENTERED APRIL 14, 1919.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact.

I.

The plaintiffs were at all the times herein mentioned a partnership composed of Louis P. Smith and James A. Smith, doing business under the name of the L. P. and J. A. Smith Company. They are citizens of the United States and reside in the city of Cleveland, in the State of Ohio, where was their principal offices, and they have at all times borne true faith and allegiance to the Government of the United States, and have not in any way aided or abetted rebellion against the said Government.

II.

In response to advertisements on behalf of the defendants inviting proposals for furnishing all labor, material, and appliances and excavating a ship channel 20 and 21 feet deep, the plaintiffs submitted proposals for said work on section 8, which section was at the mouth of the Detroit River, and which section was a part and parcel of the channel appropriated for by the act of Congress of July 13, 1892, known as the river and harbor act.

III.

On December 31, 1892, a contract in writing was entered into by O. M. Poe, colonel, Corps of Engineers, United States Army, and

the plaintiffs, whereby the plaintiffs agreed to excavate a ship channel 20 and 21 feet deep, located in section 8, mouth of Detroit River, in accordance with the specifications attached to said contract, and which were a part thereof, and the plaintiffs were to receive in full compensation for their work 18 cents per cubic yard of excavation, scow measure. A copy of the contract and specifications are attached to the petition, marked "Exhibit A."

59

IV.

The foregoing contract was duly approved by the Chief Engineers United States Army on January 19, 1893, and the plaintiffs in pursuance of said agreement proceeded to execute and carry out the provisions of the said contract, and on October 19, 1897, the plaintiffs were ordered to cease dredging on section 8, and were notified on that day that their contract was completed.

V.

Among the specifications for said contract was paragraph 91, which read as follows: "Material: The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions." In the season of 1894 the plaintiffs and defendants discovered a natural bed of limestone rock toward the northerly end of section 8, which was within the boundaries of the excavation called for by the contract, and this rock was a material which was not provided to be removed by the terms of the contract. Whereupon the defendants advertised for bids for the removal of this limestone rock from section 8 of the aforesaid ship channel. The L. P. and J. A. Smith Company, a corporation organized under the laws of the State of Ohio, submitted a bid on said work, which bid was accepted by the defendants, and a contract in writing was entered into by the said corporation with the defendants through Col. O. M. Poe, United States Army, whereby the said corporation agreed to remove said rock and other material at the price of $2.24 per cubic yard of excavation, bank measure. The said corporation completed the contract aforesaid on or about June 16, 1895. A copy of said contract and specifications are attached to the petition marked "Exhibit B."

VI.

On February 10, 1897, the plaintiffs were informed by Col. Lydecker, Corps of Engineers, United States Army, who was then in charge of the work being done by the plaintiffs under the contract of December 31, 1892, that their contract was extended to July 1, 1897, and was extended from time to time by the defendants for the completion of the work. In that year Col. Lydecker ordered the plaintiffs to work at particular spots toward the northerly end of section 8, on what was known, respectively, as Upper Rock Shoal,

Middle Rock Shoal, Hackett Rock Shoal, Lower Rock Shoal, and to do work on the Bar Point Rock Shoal, which had been excavated under the contract of November 9, 1894, with the L. P. and J. A. Smith Company. The material or a large part of the material to be removed from these points was limestone rock and limestone bedrock. The plaintiffs protested against excavating and removing limestone rock and limestone bedrock, and asked for the fixing of an extra price for doing this work. The defendants refused to fix any other price than that called for by the contract. The defendants insisted that all the material to be removed from the points above enumerated was clay, sand, gravel, and bowlders, and told the plaintiffs that if they did not remove the same the plaintiffs would be declared defaulting contractors; that the work would be taken from them; that the work would be done and the same charged to the plaintiffs; and that it would be paid for from the retained percentages in defendants' hands due the plaintiffs for work already performed under their contract, and if said percentages were not sufficient to pay for the work, the plaintiffs and their bondsmen would be proceeded against.

60

VII.

A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and bowlders was in fact limestone rock and limestone bedrock and was not the material which was specified in the contract, and which the plaintiffs had to remove under the terms of the contract.

The quantity of material excavated by the plaintiffs from June 25, 1897, to October 17, 1897, was 33,332 cubic yards, 10 per cent of which was clay, sand, gravel, and bowlders, leaving 29,998 cubic yards of limestone bedrock. From this latter quantity there is to be deducted 1,250 cubic yards, the amount excavated below grade, leaving 28,748 cubic yards of limestone rock and limestone bedrock. Of this latter quantity about 12,990 cubic yards was limestone bedrock and 15,758 cubic yards was limestone rock.

A reasonable price for removing the 12,990 cubic yards of limestone bedrock was $6.22\frac{1}{2}$ per cubic yard, which would amount to the sum of $80,862.75. A reasonable price for removing the 15,758 cubic yards of limestone rock was $2.24 per cubic yard, which would amount to $35,297.92. These two sums amount to the sum of $116,160.67. The contract price for removing clay, sand, gravel, and bowlders was 18 cents per cubic yard; 3,333 cubic yards of this material at 18 cents added to $116,160.67 makes the sum of $116,760.61. From this sum must be deducted the sum of $5,174.64, being the 18 cents per cubic yard paid the plaintiffs on the 28,748 cubic yards removed by them from June 25, 1897, to October 19, 1897, leaving due the plaintiffs by the defendants the sum of $111,585.97, which sum remains unpaid.

VIII.

From June 25 to October 19, 1897, the defendants insisted upon locating for the plaintiffs the points where dredging was to be done, and the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result, the plaintiffs being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period, from June 25 to October 19, 1897, was 385 hours and 55 minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30.

Conclusion of law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiffs are entitled to recover the sum of $111,585.97 set out in Finding VII and the sum of $7,718.30 set out in Finding VIII. It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of one hundred and nineteen thousand three hundred and four dollars and twenty-seven cents ($119,304.27).

61 *Memorandum.*

The plaintiffs in this case had a contract with the Government whereby they agreed to move from a ship channel certain material, which was specifically set forth and described in the specifications attached to the petition. The defendants over the protests of the plaintiffs required them to excavate and remove material which was not included in the contract. The defendants insisted in the face of incontrovertible evidence that the material which they required the plaintiffs to excavate and remove was the material described in the specifications, and stated to the plaintiffs that if they did not remove it they would be declared defaulting contractors; that the work would be taken from them, and would be done and charged to them, and paid for from the retained percentages due the plaintiffs for work already performed, and that if these percentages were not enough to pay for the work, the plaintiffs and their bondsmen would be proceeded against. Under these circumstances the plaintiffs excavated and removed the material, which the evidence in this case plainly shows was not the material described and specified in the contract and specifications. We think the right of the plaintiffs to recover the price for the work done by them is undisputable.

VII. JUDGMENT OF THE COURT.

At a Court of Claims held in the city of Washington on the fourteenth day of April, A. D. 1919, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the claimants, and do order, adjudge, and decree that L. P. and J. A. Smith, as aforesaid, are entitled to recover and shall have and recover of and from the defendants, the United States, the sum of one hundred and nineteen thousand three hundred and four dollars and twenty-seven cents ($119,304.27).

BY THE COURT.

62 VIII. PROCEEDINGS HAD AFTER ENTRY OF JUDGMENT.

On June 13, 1919, the defendants filed a motion for new trial.

On October 13, 1919, defendants were allowed, in open court, to file an amended motion for a new trial and for amendment of findings of fact, and said motion was filed, and claimants were given thirty (30) days in which to reply to same.

On November 10, 1919, the claimants filed a reply brief to defendants' motion for a new trial.

On December 2, 1919, the defendants filed a reply brief to claimants' brief.

On December 8, 1919, the defendants' motion for a new trial was overruled.

IX. DEFENDANTS' APPLICATION FOR, AND ALLOWANCE OF, AN APPEAL TO THE SUPREME COURT.

From the judgment rendered in the above-entitled cause on the 8th day of December, 1919, in favor of claimant, the defendants, by their Attorney General, on the 29th day of January, 1920, make application for, and give notice of, an appeal to the Supreme Court of the United States.

FRANK DAVIS, JR.,
Assistant Attorney General.

Filed January 29, 1920.

Ordered, that the above appeal be allowed as prayed for.

BY THE COURT.

February 2, 1920.

63 Court of Claims.

L. P. & J. A. SMITH,
vs.
THE UNITED STATES. } No. 23013.

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and memorandum filed by the court; of the judgment of the court; of the application of the defendants for, and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this eleventh day of February, A. D. 1920.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 27489. Court of Claims. Term No. 734. The United States, appellant, vs. L. P. & J. A. Smith. Filed February 20th, 1920. File No. 27489.

O

Court of Claims of the United States.

No. 23013.

(Supreme Court No. 734.)

L. P. AND J. A. SMITH v. THE UNITED STATES.

This cause having been submitted to the Court of Claims upon the mandate of the Supreme Court of the United States for additional findings the court, upon consideration of the record in said cause, makes the following

ADDITIONAL FINDINGS OF FACT.

I.

No officer or officers of the United States other than Col. George J. Lydecker insisted that all the material or materials to be removed from Upper Rock Shoal, Lower Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal, and Bar Rock Shoal was clay, sand, gravel, and bowlders.

II.

No other officer or officers of the United States than Col. George J. Lydecker told L. P. and J. A. Smith that if they did not remove material, which material was not in fact the material specified under the contract, then they would be declared defaulting contractors; that the work would be taken from them; that the same would be done and charged to them, and that it would be paid for from retained percentages in the hands of the defendant due them for work already performed under their contract.

III.

Charles Y. Dixon, Assistant United States engineer, Harry Hodgman, United States engineer, subinspector, and Col. George J. Lydecker, Corps of Engineers, United States Army, in charge of the work being done by plaintiffs from June 25 to October 19, 1897, insisted upon locating for L. P. and J. A. Smith the points where dredging was to be done.

It is now ordered by the Court of Claims that the clerk certify a copy of the foregoing additional findings of fact numbered I, II, and III as a part of the record in the case of L. P. and J. A. Smith *v.* The United States, appealed from the Court of Claims, to the Supreme Court of the United States.

25494—20

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1920

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
v.
L. P. & J. A. SMITH.
No. 734.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY FINDINGS OF FACT AND BRIEF.

The appellant, by the Solicitor General, moves the court for an order directed to the Court of Claims requiring said court to make and certify as part of the record here findings of fact on the several questions of fact following, to wit:

(1) Whether any officer or officers of the United States other than Col. George J. Lydecker, insisted that all the material or materials to be removed from Upper Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal, Lower Rock Shoal, and Bar Rock Shoal was clay, sand, gravel, and boulders. If so, what were their names and official positions?

(2) Whether any office or officers of the United States, other than Col. George J. Lydecker, told L. P. & J. A. Smith that if they did not remove material, which material was not in fact the mate-

rial specified under the contract, then they would be declared defaulting contractors; that the work would be taken from them; that the same would be done and the same charged to them and that it would be paid for from retained percentages in appellant's hands due them for work already performed under their contract. If so, what were their names and official positions?

(3) Whether any officer or officers, or any agent or agents of the United States, f rom June 25 to October 19, 1897, insisted upon locating for L. P. and J. A. Smith the points where dredging was to be done. If so, what were their names and official positions?

STATEMENT.

A contract was entered into between appellant and the appellees whereby appellees agreed to perform certain dredging work in the prosecution of an improvement intended to provide a ship channel connecting the waters of the Great Lakes between Chicago, Duluth, and Buffalo.

This suit was instituted in the Court of Claims to recover compensation for the performance of extra work alleged to have been performed in connection with the prosecution of the aforesaid contract.

The contract, among other things (Rec. p. 23), provides as follows:

> If at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification

should involve such change in the specifications as to character and quality, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The petition does not allege that the provisions of the contract covering the subject of compensation for extra work were complied with.

The right of recovery is based on the following allegations of the petition (Rec. p. 3):

> On the completion of said contract above set forth your petitioner resumed work under the first contract, above described at such points as the defendant from time to time directed, and excavated and removed "sand, clay, gravel, and boulders" until in the year 1897, when the defendant, through Geo. J. Lydecker, Lieut. Col., Corps of Engineers, U. S. Army, who had succeeded Colonel O. M. Poe on his death in 1896, and was in charge of said work for the defendant, ordered your petitioner to work at other certain particular points toward the northerly end of said section eight, on what was known as other rock shoals, known respectively as Upper Rock Shoal, Middle Rock Shoal, and Hackett's Rock Shoal, which said shoals were not known to exist by either your petitioner or the defendant at the time the contracts above named were entered into, and also to do additional work on Bar Point Rock Shoal, excavated under the said second contract above set forth; that there existed at these points none of the material specified to be removed under the contract of December 31, 1892, above set forth, but the material to be excavated and removed therefrom was limestone bed rock; that your petitioner protested against being compelled to excavate and remove said material and demanded that an extra price be fixed for doing said additional work, but was forced by said Geo. J. Lydecker, Lieut. Col., Corps of Engineers, U. S. Army,

engineer in charge of work for said defendant, to dredge on the various rock shoals above named, and to remove therefrom limestone bed rock under penalty, in case it refused so to do, of being declared defaulting contractor by the engineer in charge, who declared that in said event he would have the work done and the expense charged to your petitioner, the contractors, paying for it from the retained percentages in the defendant's hands due your petitioner for work already performed under said contract, and if said retained percentage was not sufficient to pay for said work, said contractors and their bond would be proceeded against.

That notwithstanding your petitioner was ordered by the said engineer in charge of said work not to remove bed rock, if found above grade in said section eight, but only "sand, clay, gravel, and boulders," your petitioner was nevertheless compelled by said engineer in charge to remove limestone bed rock from said eighth section in the year 1897, in the following amounts and figures, to wit:

	Cubic yards.
Bar Point Rock Shoal	11,117
Hackett's Rock Shoal	9,188
Middle Rock Shoal	3,992
Upper Rock Shoal	9,035
Total	33,332

that the fair market value for removing said limestone bed rock was $6.22½ per cubic yard.

The Court of Claims found the following facts (Rec. p. 39, Find. No. VI):

On February 10, 1897, the plaintiffs were informed by Col. Lydecker, Corps of Engineers,

United States Army, who was then in charge of the work being done by the plaintiffs under the contract of December 31, 1892, that their contract was extended to July 1, 1897, and was extended from time to time by the defendants for the completion of the work. In that year Col. Lydecker ordered the plaintiffs to work at particular spots toward the northerly end of section 8, on what was known, respectively, as Upper Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal, Lower Rock Shoal, and to do work on the Bar Point Rock Shoal which had been excavated under the contract of November 9, 1894, with the L. P. and J. A. Smith Company. The material, or a large part of the material to be removed from these points, was limestone rock and limestone bedrock. The plaintiffs protested against excavating and removing limestone rock and limestone bedrock, and asked for the fixing of an extra price for doing this work. The defendants refused to fix any other price than that called for by the contract. The defendants insisted that all the material to be removed from the points above enumerated was clay, sand, gravel, and bowlders, and told the plaintiffs that if they did not remove the same, the plaintiffs would be declared defaulting contractors; that the work would be taken from them; that the work would be done and the same charged to the plaintiffs; and that it would be paid for from the retained percentages in defendants' hands due the plaintiffs for work already performed under their contract, and if said percentages were not suffi-

> cient to pay for the work, the plaintiffs and their bondsmen would be proceeded against."

Upon the facts so found appellees were allowed a recovery in the sum of $111,585.97.

As one of the defenses interposed to such a recovery appellant asserted that Col. George J. Lydecker, who had succeeded to the powers conferred by the contract on Col. O. M. Poe, did not have the authority to create a legal obligation on the part of the United States to pay for the extra work alleged to have been performed.

Although the petition alleges that the extra work was performed by the order of Col. George J. Lydecker, and although there was no evidence to show that the same was performed upon the order or orders or with the authority of any other officer of the United States, the Court of Claims has found as follows:

> The defendants insisted that all the material to be removed from the points above enumerated was clay, sand, gravel, and bowlders, and told the plaintiffs that if they did not remove the same the plaintiffs would be declared defaulting contractors; that the work would be taken from them; that the work would be done and the same charged to the plaintiffs; and that it would be paid for from the retained percentages in defendants' hands due the plaintiffs for work already performed under their contract, and if said percentages were not sufficient to pay for the work, the plaintiffs and their bondsmen would be proceeded against. (Rec., p. 40.)

Appellant filed its motion for a new trial herein, among other things, appellant sought to have the Court of Claims modify and amend its findings of fact in order that it be set out therein what officer or officers acting for the United States in the matter of said improvement insisted that all the material to be removed from the points enumerated was clay, sand, gravel, and bowlders, and told plaintiffs that if they did not remove the same the plaintiffs would be declared defaulting contractors; that the work would be taken from them; that the work would be done and the same charged to plaintiffs; and that it would be paid for from the retained percentages in defendant's hands due the plaintiffs for work already performed under their contract, and if said percentages were not sufficient to pay for the work, the plaintiffs and their bondsmen would be proceeded against, which motion was by the court overruled.

ARGUMENT.

The petition alleges that the extra work was performed upon the orders and directions of Col. George J. Lydecker. The fact was established by the evidence that if any officer of the United States procured the performance of the extra work, that such officer was Col. George J. Lydecker. At the trial of the cause appellant set up as one of its defenses that Col. George J. Lydecker did not have the authority to place upon the United States an obligation to pay for the extra work alleged to have been performed by reason of the express provisions of the contract.

Whether Col. Lydecker had the authority to fix such an obligation on the United States is a question of law upon which appellant has the right to have this court pass.

In view, however, of the peculiar wording of the findings of fact referred to, it is possible that on appeal this court may take the position that some other officer or officers of the United States than Col. Lydecker acted for the United States in the matter of insisting that all the material to be removed consisted of clay, sand, gravel, and bowlders, and threatened the annulment of the contract unless the same was removed.

Without conceding that any officer of the United States could have fixed an obligation on the United States in the manner set forth under the findings of fact in question, it is insisted here, as it was before the Court of Claims, that Col. Lydecker did not have such authority, and this question of law is proper for this court to determine on appeal.

The findings of fact of the Court of Claims is in the nature of a special verdict. Under Rule I of this court relating to appeals from the Court of Claims, it is required that the record in the case shall consist in part of a finding by the court of the facts in the case, established by the evidence, and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment.

The United States acts only through its authorized officers whose powers are limited to those powers expressly conferred. *Floyd Acceptances*, 7

Wall. 666, 680; *Hawkins* v. *United States*, 96 U. S. 689, 691. The contract covering the improvement in question conferred on designated officers particular powers to act within certain limits for the United States in the matter of the improvement. It contained a power to procure the performance of extra work. Whether an officer who procured the extra work had the power to do so depends upon the construction of the contract which is held to be a question of law. *Levy* v. *Gadsby*, 3 Cranch 180, 186; *Ward* v. *United States*, 14 Wall. 28; *Hughes* v. *Dundee Mortgage Co.*, 140 U. S. 98, 104.

A statement such as—Col. Lydecker, Corps of Engineers, United States Army, ordered the performance of the extra work—is a statement of an ultimate fact as contemplated under the rule of this court. Yet a statement such as—"defendants" (referring to the United States) ordered the performance of the extra work—is not only a statement of fact but a conclusion of law, the conclusion being that the United States had acted through its officers, and that such officers had acted within the scope of express authority conferred upon them.

To state the case in another way: Assume that the finding had stated that the extra work was performed on the orders of Col. Lydecker and that Col. Lydecker by virtue of the contract had the authority to act for the United States in procuring the same. Under such circumstances, this court on appeal would not be precluded from reviewing the question of the authority of Col. Lydecker. It

follows, therefore, if such a result could not be attained by the Court of Claims by means of a full and explicit statement, *a fortiori*, it can not be attained by an incomplete and indefinite statement.

The part of Finding No. VI which is objectionable is a statement of the legal effect of a fact which fact has not been stated. It is violative of the rule of this court, which requires a statement of the facts established by the evidence in the case in the nature of a special verdict and a separate statement of the conclusions of law. *United States* v. *Adams*, 9 Wall. 661; *United States* v. *Pugh*, 99 U. S. 265, 270; *Intermingled Cotton Cases*, 92 U. S. 651; *Mayham* v. *United States*, 14 Wall. 109.

This motion is urged for the sole purpose of securing for appellant the right to have this court pass on the question of the authority of Col. Lydecker to procure the performance of the extra work for the execution of which appellees were allowed to recover. Therefore, should the court conclude, in view of the allegations of the petition (Rec. p. 23), and the statements contained in Finding VI (Rec. p. 39) to the effect that Col. Lydecker ordered the work done, that although the Court of Claims has stated in its findings that "Defendants insisted that all the material to be removed * * * was sand, gravel, clay and boulders, and to plaintiffs, etc.," it can be considered that the things alleged to have been done by "defendants" were in fact done by Col. Lydecker, Corps of Engineers, United States Army, then the objection to the finding would be

removed and there would be no necessity for remanding for further findings of fact—

The appellant by this motion seeks to insure its right to have this court pass on the question of the scope of authority of an officer of the United States.

CONCLUSION.

It is respectfully submitted that the order herein prayed for should be granted.

ALEX. C. KING,
Solicitor General.
FRANK DAVIS, JR.,
Assistant Attorney General.
WILFRED HEARN,
Special Assistant to the Attorney General.

○

Office Supreme Court, U. S.
FILED
JUN 1 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

No. 253

THE UNITED STATES, *Appellant*,

vs.

L. P. & J. A. SMITH.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY ADDITIONAL FINDINGS OF FACT.

ROSCOE M. EWING and
RUFUS S. DAY,
Attorneys for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No. 734.

THE UNITED STATES, *Appellant*

vs.

L. P. & J. A. SMITH.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY ADDITIONAL FINDINGS OF FACT.

Counsel for appellant has moved the Court to direct the Court of Claims to find:

(1) "Whether any officer or officers of the United States other than Col. George J. Lydecker, insisted that all the material or materials to be removed from Upper Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal, Lower Rock Shoal, and Bar Rock Shoal was clay, sand, gravel and boulders. If so, what were their names and official positions?

(2) "Whether any officer or officers of the United States, other than Col. George J. Lydecker, told L. P. & J. A. Smith that if they did not remove material, which material was not in fact the material specified under the contract, then they would be declared defaulting contractors; that the work would be taken from them; that the same would be done and the same charged to them and that it would be paid for from retained percentages in appellant's hands due them for work already performed under their contract. If so, what were their names and official positions?

(3) "Whether any officer or officers, or any agents or agents of the United States, from June 25 to October 19, 1897, insisted upon locating for L. P. and J. A. Smith the points where dredging was to be done. If so, what were their names and official positions?"

Appellee objects to the granting of this motion, and to this attempt on the part of appellant to bring coercion to bear on the Court of Claims to find facts in favor of the appellant that are neither material nor competent and are contrary to the proof adduced before the Court of Claims:

(1) Because the Court of Claims has already found as a matter of fact that all the work performed for which recovery was had was performed by the request and demand of the defendant, the United States, and under protest by the appellee herein.

(2) Because the recovery and judgment heretofore rendered was not based upon a claim for extra work under a modified contract, but upon the arbitrary and erroneous classification by the United States Engineer Officers in charge, of the materials dredged.

(3) Because this case does not involve the determina-

tion of the authority of the United States Engineer Officer in charge, to wit: Col. George J. Lydecker, to make a contract, either express or implied, for extra work.

(4) Because there is no necessity for, nor would there have been any materiality in a finding by the Court of Claims as to whether any officer other than Col. George J. Lydecker insisted on all materials being removed from the rock shoals mentioned, or whether any officer other than Col. Lydecker declared that plaintiff's failure to remove the materials would cause a forfeiture of plaintiff's contract, it already having been found that the defendant ordered the same done.

(5) Because the Court has already found that Col. George J. Lydecker, Engineer Officer in charge, insisted upon locating the points where the dredging was to be done. (See the last three lines, on page 39 of the Record, of findings of fact of Court of Claims.)

STATEMENT.

For the purpose of convenience the parties herein will be named in the order in which they appeared in the Court below.

The plaintiff contends that the motion filed herein is based upon a misconception of the facts. The plaintiff will not set forth at length the facts on which this claim is based, but respectfully refers the Court to the findings of fact of the Court of Claims as submitted in the record of this case, and found on pages 38 *et seq.*

The plaintiff has always contended, and the Court of Claims found as a matter of fact, that in the dredging of the Detroit River in that section embraced by the contract, the plaintiff encountered material other than sand, clay, gravel, and boulders, which was the

material specified to be dredged under the contract, and that when this material was encountered, the plaintiff protested against the excavating of it which plaintiff claimed, and which was so found to be true by the Court of Claims, consisted of limestone and limestone bedrock, and not sand, clay, gravel and boulders, as provided for in the contract.

The sole and only question involved in this case was whether or not the materials dredged by the plaintiff should have been classified as sand, clay, gravel and boulders, or should have been classified as limestone and limestone bedrock. During the progress of the work the United States Engineer officer in charge, Col. Lydecker, insisted on arbitrarily and erroneously classifying *all* material as sand, clay, gravel and boulders, and therefore within the contract, but plaintiff contended that the same was limestone and limestone bedrock and not covered by the contract, and demanded that an extra price and a new contract be made therefor, all of which was refused by the defendant, relying on that clause of the contract which reads as follows (Record, p. 9, Sec. 33):

> "The decision of the Engineer Officer in charge as to quality and quantity shall be final."

The Court of Claims has found it to be a fact that the plaintiff's contention was correct; that the Engineer Officer in charge of the work was erroneous in his classification; that the classification was arbitrary and unwarranted and made in the face of incontrovertible evidence. It thus clearly appears that the question of a change of project or extra work thereunder which invokes the question of authority of the United States

Engineer Officer in charge to create an obligation on the part of the United States is not involved in this case, and the defendant's assumption to the contrary is based wholly upon a misconception of the facts as disclosed in the record and as found by the Court of Claims.

ARGUMENT.

The findings of fact specifically show that Col. George J. Lydecker, the Engineer Officer in charge, absolutely refused to fix an extra price for the materials to be dredged and make a contract for any extra work or a modification of the project. No "extra work" was ever authorized by Lydecker under any agreement to pay therefor, and therefore the authority of any officer of the United States to order the doing of extra work as such is not involved in this case. The Court of Claims found that plaintiff always insisted, that the extra work be authorized, but their request in this respect was never complied with, because the United States Engineer Officer in charge erroneously and arbitrarily and in total disregard of the facts as the Court of Claims has found, held that the work performed was included within the requirements of the original contract. For these reasons the questions raised by the defendant's motion are not pertinent to the issues involved in this case.

The Court of Claims having found that the United States Engineer Officer in charge acted arbitrarily, erroneously, without full knowledge of the facts and regardless of the facts in the classification of the materials dredged, the plaintiffs were entitled to the reasonable value of their services in removing the limestone and limestone bedrock on a *quantum meruit* basis.

We therefore submit that the motion filed herein is not well taken and the requests of the appellant are immaterial and involved only incidental facts and amount only to evidence which is solely within the province and jurisdiction of the Court of Claims, and that the Court of Claims has disposed of the real question in this case when it found as a matter of fact (Record, p. 40):

> "A large part of the material which the Engineer Officer in charge arbitrarily stated to be clay, gravel, sand and boulders, was in fact limestone rock and limestock bedrock, and was not the material which was specified in the contract, and which the plaintiff had to remove under the terms of the contract."

and that (Record, p. 40):

> "The plaintiffs protested against excavating and removing limestone rock and limestock bedrock and asked for the fixing of an extra price for doing this work. The defendants refused to fix any other price than that called for by the contract."

We further contend that this motion should be denied as this question has been disposed of in the case of the Union Pacific Railway Co. vs. United States, 116 U. S., 154, Syl. 2, of which reads as follows:

> "When the Court of Claims, on being requested by a party in a cause there pending to find specifically upon several facts which are only incidental facts and amount only to evidence touching the main facts in issue, and the court disregards the requests and finds the facts at issue generally, and

judgment is entered, and the party whose request was denied appeals, this Court will not remand the case to the Court of Claims, with directions to specifically pass upon each of said requests, or to make a finding of facts on the subject embraced in each of said requests."

The appellee therefore submits that said motion should be denied and that a special verdict having been rendered that the plaintiffs are entitled to One Hundred Nineteen Thousand Three Hundred Four Dollars and Twenty-seven Cents ($119,304.27), the Court should affirm said special judgment or dismiss the appeal on the ground that said findings of fact and conclusions of law as found by the Court of Claims are so clearly well founded and established that the same necessitates no further argument.

Respectfully submitted,

ROSCOE M. EWING and

RUFUS S. DAY,

Attorneys for Appellee.

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Fogg v. *Blair*, 139 U. S. 118 l. c. 127	19
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In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
v.
L. P. & J. A. SMITH.
No. 253.

APPEALED FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by the Government from a judgment of the Court of Claims awarding claimants the sum of $119,304.27. One item of the recovery represents compensation in the amount of $111,585.97 allowed for work done in connection with, but outside and extra of, a contract between the parties for dredging in Detroit River. The other item in- in cluded the recovery, i. e., $7,718.30, represents the loss alleged to have been sustained by reason of delays in the performance of the work.

PETITION.

In substance the petition sets forth that on December 31, 1892, claimants entered into a contract with the United States through O. M. Poe, colonel, Corps of Engineers, United States Army, whereby

claimants undertook to dredge from section eight of the area of a proposed ship channel, in the shallows of and connecting the waters of the Great Lakes between Duluth, Chicago, and Buffalo, materials known as sand, gravel, clay, and bowlders. The said contract was on the 19th day of January, 1893, approved by Thomas Lincoln Casey, brigadier general, Chief of Engineers.

That in the year 1894 while working under said contract a natural bed of limestone rock was discovered to exist within the boundaries of the area specified in said contract, which material was not the material claimant had by said contract undertaken to remove. That, thereupon, a supplemental contract was entered into between the parties for the removal of said newly discovered material.

That after the completion of the supplemental contract aforesaid claimant resumed work under the first contract at such points as directed, when George J. Lydecker, lieutenant colonel, Corps of Engineers, United States Army, who had succeeded Col. O. M. Poe, on his death in 1896, and who was in charge of said operations for the United States, ordered claimant to remove from the area of section eight of said channel limestone bed rock; that claimant protested being compelled to remove said material and demanded that an extra price be fixed for doing such additional work; that notwithstanding the protest made claimant was forced by said George J. Lydecker, lieutenant colonel, Corps of Engineers, United States Army, engineer in charge of said work

for the United States, to remove said bed rock under penalty of being declared a defaulting contractor by the engineer in charge.

That notwithstanding your petitioner was ordered by said engineer in charge of said work not to remove bed rock if found above grade in said section eight, but only sand, clay, gravel, and bowlders, your petitioner was nevertheless compelled by said engineer in charge to remove limestone bed rock from said eighth section in the year 1897, in the following amounts and figures, to wit: (Petition, Rec. 3–4.)

That by reason of delays in the prosecution of said work caused by the officers and agents of the United States claimant sustained a further certain loss.

The original contract was made a part of the petition and marked Exhibit A thereto.

Its provisions which are material in the presentation of the questions involved on this appeal are as follows:

SPECIFICATIONS.

33. *The decision of the Engineer's officer in charge as to quality and quantity shall be final.* [Italics ours.] (Rec. 9.)

37. INSPECTION.—*The order of the work will be determined by the U. S. agent in charge, and his instructions shall be observed by the contractor and his employees.* When required by the U. S. agent in charge, the contractor shall, without additional compensation, furnish all necessary labor, materials and ap-

pliances for placing and replacing suitable stakes and buoys for use in making surveys for estimates, and for marking the channel. He shall also, without additional compensation, furnish the use of a tug when needed for towing the sounding rafts or scows, conveying engineers, inspectors, and other employees of the United States, and generally for all purposes connected with the inspection and supervision of the work. When required by the U. S. Engineer in charge, all agents or inspectors of the United States employed on or about the work shall have meals and sleeping accommodations furnished by the contractor at a reasonable price, approved by the U. S. Engineer in charge, and paid for by the United States.

All plant used shall be kept in good working condition. Each scow used shall be marked with a distinctive name or number, and whenever practicable it shall be loaded to its full capacity. Loads on deck scows or lighters will be measured separately, and partial loads in dump-scows will be estimated, by the inspector, and his measurements and estimates, if approved by the Engineer officer in charge, shall be final.

If any person employed by the contractor on any portion of the work shall appear to be incompetent or objectionable, he shall be discharged immediately upon the request of the U. S. agent in charge, and such person shall not again be employed upon any portion of the work.

In case of differences arising between the U. S. agent in charge and the contractor in regard to the work or to the specifications, appeal may be made to the Engineer Officer in charge. [Italics ours.] (Rec. 10.)

91. MATERIAL.—*The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions.* [Italics ours.] (Rec. 18.)

ARTICLES OF AGREEMENT.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. *The decision of the Engineer Officer in charge as to quality and quantity shall be final.*

* * * * *

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor, legally appointed, shall have power, *with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part,* and, upon the giving of such notice, all money or reserved percentage due

or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States. (Rec. 22.) [Italics ours.]

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quality, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided,* That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon

by the contracting parties and approved by the Chief of Engineers. (Rec. 23.) [Italics ours.]

This contract shall be subject to approval of the Chief of Engineers, U. S. A. (Rec. 24.)

Upon the motion of appellant this case was remanded for additional findings.

The original and additional findings which are pertinent will be here set out.

FINDING VI.

On February 10, 1897, the plaintiffs were informed by Col. Lydecker, Corps of Engineers, United States Army, who was then in charge of the work being done by the plaintiffs under the contract of December 31, 1892, that their contract was extended to July 1, 1897, and was extended from time to time by the defendants for the completion of the work. In that year Col. Lydecker ordered the plaintiffs to work at particular spots toward the northerly end of section 8, on what was known, respectively, as Upper Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal, Lower Rock Shoal, and to do work on the Bar Point Rock Shoal, which had been excavated under the contract of November 9, 1894, with the L. P. and J. A. Smith Company. The material or a large part of the material to be removed from these points were limestone rock and limestone bedrock. The plaintiffs protested against excavating and removing limestone rock and limestone bedrock, and asked for the fixing of an extra price for doing this work. The defendants refused to fix any other price than that called for by the

contract. The defendants insisted that all the material to be removed from the points above enumerated was clay, sand, gravel, and boulders, and told the plaintiffs that if they did not remove the same the plaintiffs would be declared defaulting contractors; that the work would be taken from them; that the work would be done and the same charged to the plaintiffs; and that it would be paid for from the retained percentages in defendants' hands due the plaintiffs for work already performed under their contract, and if said percentages were not sufficient to pay for the work, the plaintiffs and their bondsmen would be proceeded against. (Rec. 39.)

FINDING VII.

A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and boulders was in fact limestone rock and limestone bedrock, and was not the material which was specified in the contract, and which the plaintiffs had to remove under the terms of the contract.

The quantity of material excavated by the plaintiffs from June 25, 1897, to October 17, 1897, was 33,332 cubic yards, 10 per cent of which was clay, sand, gravel, and boulders, leaving 29,998 cubic yards of limestone bedrock. From this latter quantity there is to be deducted 1,250 cubic yards, the amount excavated below grade, leaving 28,748 cubic yards of limestone rock and limestone bedrock. Of this latter quantity about 12,990 cubic yards was limestone bedrock and 15,758 cubic yards was limestone rock.

A reasonable price for removing the 12,990 cubic yards of limestone bedrock was $6.22\frac{1}{2}$ per cubic yard, which would amount to the sum of $80,862.75. A reasonable price for removing the 15,758 cubic yards of limestone rock was $2.24 per cubic yard, which would amount to $35,297.92. These two sums amount to the sum of $116,160.67. The contract price for removing clay, sand, gravel, and boulders was 18 cents per cubic yard; 3,333 cubic yards of this material at 18 cents added to $116,160.67 makes the sum of $116,760.61. From this sum must be deducted the sum of $5,174.64, being the 18 cents per cubic yard paid the plaintiffs on the 28,748 cubic yards removed by them from June 25, 1897, to October 19, 1897, leaving due the plaintiffs by the defendants the sum of $111,585.97, which sum remains unpaid. (Rec. 40.)

FINDING VIII.

From June 25 to October 19, 1897, the defendant insisted upon locating for the plaintiffs the points where dredging was to be done, and the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result, the plaintiffs being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period, from June 25 to October 19, 1897, was 385 hours and 55 minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30. (Rec. 4.)

ADDITIONAL FINDINGS OF FACT.

I.

No officer or officers of the United States other than Col. George J. Lydecker insisted that all the material or materials to be removed from Upper Rock Shoal, Lower Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal and Bar Rock Shoal was clay, sand, gravel, and bowlders.

II.

No other officer or officers of the United States than Col. George J. Lydecker told L. P. and J. A. Smith that if they did not remove material, which material was not in fact the material specified under the contract, then they would be declared defaulting contractors; that the work would be taken from them; that the same would be done and charged to them, and that it would be paid for from retained percentages in the hands of the defendant due them for work already performed under their contract.

III.

Charles Y. Dixon, assistant United States engineer, Harry Hodgman, United States engineer, subinspector, and Col. George J. Lydecker, Corps of Engineers, United States Army, in charge of the work being done by plaintiffs from June 25 to October 19, 1897, insisted upon locating for L. P. and J. A. Smith the points where dredging was to be done.

ASSIGNMENT OF ERRORS.

It is submitted that the court erred in the following particulars:

1. In concluding from the facts found that there was a violation of any duty under the contract on the part of the United States.

2. In misapplying the law to the facts as found.

3. In holding that under the facts as found it had jurisdiction to award a judgment in favor of claimant

BRIEF OF ARGUMENT.

1. The work performed for which an allowance of $111,585.97 was made was not work provided for or required by the terms of the contract, but was extra and outside of the contract.

2. No obligation to pay for extra work was created because the provisions of the contract relating to the procurement of, and the payment for, extra work were not complied with, and there was not a waiver of such provisions.

3. There was no breach of warranty by the United States relating to a matter material and necessary to the performance of the contract.

4. The petition does not allege neither has the court found that bad faith on the part of an officer of the United States in the exercise of the powers conferred upon such officer produced the injury of which claimants complain, and as compensation for which the sum of $111,585.97 was allowed.

5. That it does not appear from the findings that the award of the sum of $7,718.30 as compensation for time lost by claimant was founded on a breach of contract by the United States or the exercise of fraud or bad faith by an officer of the United States in the exercise of delegated powers.

I.

Argument relating to award for extra work.

Under the facts as found the Court of Claims allowed a recovery for the removal of materials not provided for and not required by the terms of the contract. The contract provided for the removal of "clay, sand, gravel, and boulders" at the price of 18 cents per cubic yard. The Court in its award has made an allowance for the removal of limestone rock at the rate of $2.24 per cubic yard, and limestone bed rock at the rate of $6.22½ per cubic yard.

In view of the provisions of the contract, the allegations of the petition of claimant and the facts as found by the Court of Claims we may safely proceed upon the theory that the allowance of $111,585.97 was for work outside and extra of the contract.

But the contract provides that:

> No claim shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the part of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers. (Rec. 23.)

The petition does not allege that there was such a a writing. The Court does not find as a fact that there was such a writing. Furthermore, a recovery could not be had based upon such a writing unless the same was pleaded.

Whenever the contract covering the improvement to be made contains provisions relating to change of project and claims for extra work which are in effect the same as the provisions in the contract between the parties here, then in the event such provisions have not been complied with payment for extra work performed can be secured only in the following cases:

(*a*) When such provisions have been waived by an agent having the power to waive the same. (*Barlow* v. *U. S.*, 184 U. S. 123.)

(*b*) When there has been a breach of warranty by the Government relating to a matter necessary to be done in the performance of the contract by reason of which breach the extra work is required to be performed. (*Christie* v. *U. S.*, 237 U. S. 234.)

(*c*) When the extra work is made necessary or procured through the fraud or bad faith of an agent of the Government in the exercise of expressly delegated powers. (*Ripley* v. *U. S.*, 223 U. S. 695.)

It follows, therefore, that if claimant is entitled to recover compensation for the performance of extra work claimants' case must come within at least one of the principles announced in the cases cited.

NO WAIVER OF PROVISIONS.

The contract was made subject to the approval of the Chief of Engineers. No waiver of its provision

could have been made except by the Chief of Engineers.

Haukins v. *U. S.*, 96 U. S. 689.
Barlow v. *U. S.*, 184 U. S. 123.
Plumley v. *U. S.*, 222 U. S. 545.

To prevent the possible inference from the facts as originally found that the Chief of Engineers had procured the performance of the extra work, appellant made its motion that this case be remanded for additional findings of fact, which was granted. From the additional facts as found it clearly appears that whatever extra work was performed at the request or upon the order of an agent of the United States that the same was performed upon the request or order of Col. George J. Lydecker, Engineer officer in charge.

In view of the facts as found it cannot be successfully urged that the Chief of Engineers waived the provisions of the contract. He alone had the authority to waive the same.

BREACH OF WARRANTY.

It does not appear from the facts as found that a breach of warranty on the part of the Government made the extra work necessary. The petition does not so allege. Such a claim has not been made.

BAD FAITH.

Appellant's motion that this case be remanded for additional findings of fact has served a further good purpose, in that counsel for appellee in the brief in opposition to such motion has stated in very clear language the theory upon which a recovery for the performance of the extra work was allowed.

In view of the relevancy of said statements to the point now to be discussed they are here set out.

> The sole and only question involved in this case was whether or not the materials dredged by the plaintiff should have been classified as sand, clay, gravel, and boulders, or should have been classified as limestone and limestone bedrock. During the progress of the work the United States Engineer officer in charge, Col. Lydecker, insisted on arbitrarily and erroneously classifying *all* material as sand, clay, gravel, and boulders, and therefore within the contract, but plaintiff contended that the same was limestone and limestone bedrock and not covered by the contract, and demanded that an extra price and a new contract be made therefor, all of which was refused by the defendant, relying on that clause of the contract which reads as follows:
>
> The decision of the Engineer officer in charge as to quality and quantity shall be final.
>
> The Court of Claims has found it to be a fact that the plaintiff's contention was correct; that the Engineer officer in charge of the work was erroneous in his classification; that the classification was arbitrary and unwarranted and made in the face of incontrovertible evidence. It thus clearly appears that the question of a change of project or extra work thereunder which invokes the question of authority of the United States Engineer officer in charge to create an obligation on the part of the United States is not involved in this case, and the defendant's assumption to the

> contrary is based wholly upon a misconception of the facts as disclosed in the record and as found by the Court of Claims.
>
> * * * * *
>
> The Court of Claims having found that the United States Engineer officer in charge acted arbitrarily, erroneously, without full knowledge of the facts and regardless of the facts in the classification of the materials dredged, the plaintiffs were entitled to the reasonable value of their services in removing the limestone and limestone bedrock on a quantum meruit basis.
>
> (Appellee's brief in opposition to appellant's motion for an order on the court to make and certify additional findings of fact (pp. 4–5).)

The only objection that is found with the statement above quoted is that the Court of Claims did not find the facts as they are therein stated.

The court states the facts in the following language:

> A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and bowlders was in fact limestone rock and limestone bed rock, and was not the material which was specified in the contract, and which the plaintiff had to remove under the terms of the contract. (Finding VII, R. 40.)

It is true that the Court of Claims in its memorandum stated that "the defendants insisted in the face of incontrovertible evidence that the material which they required the plaintiffs to excavate and remove was the material described in the specifications,

etc." (Rec. 41.) But this court has repeatedly held that the facts necessary to support a recovery must appear in the findings of fact; that the opinion of the court can not supply such an omission.

The court's attention is particularly invited to the utter absence of an explicit finding by the Court of Claims that there was fraud or bad faith exercised by Col. George J. Lydecker in passing judgment on the quality and quantity of material dredged.

The only expression by the Court of Claims that could under any construction suggest the practice of fraud or bad faith is found in the following statement:

VII.

> A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and bowlders was in fact limestone rock and limestone bedrock and was not the material which was specified in the contract, and which the plaintiffs had to remove under the terms of the contract. (Rec. 40.)

And the only word in said statement that could be so construed as to suggest fraud or bad faith is the word "arbitrarily."

But a statement made arbitrarily is not a statement made fraudulently or in bad faith. If so an arbitrary officer is a dishonest officer. This is not true of course.

This court in the case of *Ripley* v. *U. S.*, 220 U. S. 491, had before it for determination the significance of a statement from which it was contended that

fraud and bad faith on the part of an officer had been found as a fact.

In that case his honor Chief Justice White in his opinion remanding the case says:

> We are of opinion, however, that while it may be open to conjecture that the word "manifest" as used by the court in its finding is susceptible of the broad significance which the argument thus imputes to it, we do not think such meaning is so clear and free from doubt as to justify us in concluding that there was bad faith on the part of the Government inspector in charge of the work. We say this because it is certain that we may not draw the inference of bad faith unless the findings are so clear on the subject as to cause such inference to be plain beyond controversy. It follows, therefore, that the finding below on the subject of the knowledge and bad faith of the inspector is so incomplete and inconclusive as to render it impossible for us to decide the cause without grave risk of doing wrong to the plaintiff or serious injury to the Government (l. c. 495–6).

This case was remanded for additional finding.

When the case was again before this Court, *Ripley* v. *U. S.*, 222 U. S. 144, the question whether there was fraud or bad faith was again presented for the consideration of the Court. Whereupon the case was again remanded for additional findings. The case came back to this Court, *Ripley* v. *U. S.*, 223 U. S., 695 whereupon it was decided that the Court of

Claims had finally made a definite finding of fraud in the use of the following language (l. c. 700).

> 2. The refusal of said assistant engineer, as inspector in immediate charge of the work, to allow crest blocks to be laid when he knew that parts of the core had settled and consolidated as aforesaid was gross error and an act of bad faith on his part.

FRAUD OR BAD FAITH NOT PLEADED.

If appellant's position, that the findings do not show fraud, is well taken, then it is contended that the case should not be remanded for additional findings for the reason that the claimant has not alleged bad faith or fraud and therefore the subject of fraud is not a proper subject of a finding.

No rule of pleading is more firmly established than the rule that fraud and bad faith, if to be the basis of a recovery, must be specifically pleaded.

> *New Albany* v. *Burke*, 11 Wall. 96, l. c. 106.
> *Kent* v. *Lake Superior Iron Co.*, 144 U. S. 75, l. c. 91.
> *Evers* v. *Watson*, 156 U. S. 228, l. c. 237.
> *Fogg* v. *Blair*, 139 U. S. 118, l. c. 127.

Although the rules of pleading in the Court of Claims are liberal, the recovery can be had only on the case set forth in the petition. The Government is entitled to know what constitutes the basis of claimant's cause of action and should not be required to defend a cause of action which is not set out in the petition.

The petition herein does not allege that Col. Lydecker abused the power conferred under the contract to pass judgment on the quality and quantity of the material. Nowhere in the petition is there to be found even an inference of fraud or bad faith.

On this point the attention of the court is especially invited to the case of the *United States* v. *Gleason*, 175 U. S. 588, appealed from the Court of Claims, wherein it is held that there must be an allegation and proof of bad faith. The court in the opinion says:

> The fallacy, as we think, in the position of the court below was in assuming that it was competent to go back of the judgment of the engineer, and to revise his action by the views of the court. *This, we have seen, could only be done upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith. But in this case we find neither allegation nor proof.* The only allegation in the petition which can be pointed to bearing on this subject is as follows: "That on or about December, 1888, the said Maj. Amos Stickney refused to plaintiffs the extension of time which they requested, and to which they were rightfully entitled under the contract, by reason of being prevented from completing the same within the time limited by the last extension and renewal thereof, by freshets and by force and violence of the elements and by no fault of their own, and by reason of damages and hindrances from causes within the control of the United States; and the plaintiffs were thereby prevented from completing the work. And the plaintiffs aver

and charge that the said refusal of the said Stickney to extend the time for the completion of the contract was wrongful and unjust, and a breach of the contract."

In other words, the plaintiffs allege that they were prevented from completing their work by force and violence of the elements and not by any fault of their own, and that the judgment of the engineer in refusing an extension was therefore wrongful and unjust. But as they had agreed, in the contract as we have construed it, that the engineer was to decide whether the failure to complete was due to the force of the elements or to their fault, their allegation now is that the determination of the engineer was wrongful and unjust, because he decided the submitted issue against them. *Of course such an allegation was wholly insufficient on which to base an attempt to upset the judgment of the engineer.* (l. c. 607.) [Italics ours.]

* * * * *

Without protracting the discussion, our conclusions are that, under a proper construction of the contracts in this case, the right or privilege of the contractors, if they failed to complete their work within the time limited, to have a further extension or extensions of time, depended upon the judgment of the engineer in charge when applied to to grant such extension and *that no allegation or finding is shown in this record sufficient to justify the court in setting aside the judgment of the engineer as having been rendered in bad faith, or in any dishonest disregard of the rights of the contracting parties.* (l. c. 608.) [Italics ours.]

It is submitted, therefore, that the Court of Claims has not found fraud or bad faith, and that this case should not be remanded for further findings on that question for the reason that the petition does not contain allegations setting forth fraud or bad faith.

II.

The award as compensation for lost time.

The Court of Claims awarded a recovery in the sum of $7,718.30 as compensation for a loss sustained by the contractor by reason of delays.

On this claim the court made the following finding:

> From June 25 to October 19, 1897, the defendants insisted upon locating for the plaintiffs the points where dredging was to be done, and the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result, the plaintiffs being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period, from June 25 to October 19, 1897, was 385 hours and 55 minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30.

Under the specifications covering the work it was provided that "the order of the work will be determined by the United States agent in charge, and his instructions shall be observed by the contractor and his employees." (Rec. 10.)

There was no breach of the contract, therefore, arising from the proper exercise of the right of locating the points where dredging was to be done.

The officer in charge was entitled to a reasonable time under the circumstances for locating the points where dredging was to be done. The only theory upon which the recovery of this item could be allowed is that of unreasonable delay in locating such points by the officer in charge.

But the Court of Claims has not found that there was an unreasonable delay in locating the points or that in the exercise of the right to locate such points the officer in charge was guilty of fraud or bad faith.

It is contended, therefore, that the facts as found by the Court of Claims are not sufficient to justify an award as compensation for the time alleged to have been lost.

CONCLUSION.

No recovery should have been allowed on the claim for the removal of material not specified in the contract to be removed for the following reasons:

(*a*) The provisions of the contract relating to compensation for extra work performed were not complied with.

(*b*) Such provisions of the contract were not waived.

(*c*) There was no breach of warranty necessitating the performance of the extra work.

(*d*) There is no allegation in the petition charging fraud or bad faith and the facts do not establish fraud or bad faith.

No recovery should be allowed on the claim for delays because it does not appear from the facts that such delays were due to a breach of the contract.

It is therefore submitted that the judgment of the Court of Claims should be reversed and the case remanded, with directions to dismiss the petition.

FRANK DAVIS, JR.,
Assistant Attorney General.

WILFRED HEARN,
Special Assistant to the Attorney General.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES, APPELLANT,
v.
L. P. & J. A. SMITH.
No. 253.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

The question of a breach of warranty as the basis of this claim was not discussed in the Government's opening brief for the reason that no such contention was made by appellee either in the petition, the findings of fact and opinion of the lower court, or the brief on behalf of appellee on appellant's motion to remand the case for additional findings of fact, extracts from which appear in the brief on behalf of appellant heretofore filed.

The recovery allowed by the Court of Claims was for work not required by the contract, but which claimant was compelled to perform by the arbitrary action of an agent of the United States. It is stated in the opinion of the Court of Claims:

> The plaintiffs in this case had a contract with the Government whereby they agreed to

> move from a ship channel certain material, which was specifically set forth and described in the specifications attached to the petition. The defendants over the protests of the plaintiffs required them to excavate and remove material which was not included in the contract. The defendants insisted in the face of incontrovertible evidence that the material which they required the plaintiffs to excavate and remove was the material described in the specifications, and stated to the plaintiffs that if they did not remove it they would be declared defaulting contractors. (Rec., 41.)

It is now contended that revovery was allowed on account of a breach of warranty. This is an absolutely new theory. The petition fails to allege that there was a breach of warranty regarding the material to be encountered but on the contrary does allege that the only material the contractor was required to excavate was the material designated in the specifications as sand, gravel, clay, and bowlders. The petition in part says:

> V. In the season of 1894, while working under said contract, toward the northerly end of said eighth section, your petitioner and the defendant discovered a natural bed of limestone rock called "Bar Point Rock Shoal," within the boundaries of the excavation called for by the contract, and which was a material not provided for by said contract to be removed, said contract calling only for the removal of "sand, clay, gravel, and boulders," whereupon a supplementary contract was ordered by the defendant to be entered into for

the removal of said natural limestone bed rock * * *." (Rec. p. 2.)

VI. On the completion of said contract above set forth, your petitioner resumed work under the first contract, above described, at such points as the defendant from time to time directed, and excavated and removed "sand, clay, gravel, and boulders" until in the year 1897, when the defendant, through Geo. J. Lydecker, Lieut. Col., Corps of Engineers, U. S. Army, who had succeeded Colonel O. M. Poe on his death in 1896, and was in charge of said work for the defendant, ordered your petitioner to work at other certain particular points toward the northerly end of said section eight, on what was known as other rock shoals, known respectively as Upper Rock Shoal, Middle Rock Shoal, and Hackett's Rock Shoal, which said shoals were not known to exist by either your petitioner or the defendant at the time the contracts above named were entered into, and also to do additional work on Bar Point Rock Shoal, excavated under the said second contract above set forth, that there existed at these points none of the material specified to be removed under the contract of December 31, 1892, above set forth, but the material to be excavated and removed therefrom was limestone bed rock. (Rec. p. 3.)

It is clear, therefore, that the parties to the contract did not look upon the specifications regarding the material as a warranty, but that the specifications in that regard determined and fixed the scope of the work undertaken by the contractor.

The attention of the court is invited to the language of the third paragraph of the articles of agreement, being in the following words and figures:

> That the said L. P. and J. A. Smith shall furnish all labor, materials, and appliances, *and shall excavate and remove the material, etc., as specified,* for the width of 800 feet, for a ship channel 20 and 21 feet deep between Chicago, Duluth, and Buffalo, located in the eighth section, mouth of the Detroit River, and shall receive in full compensation therefor at the rate of eighteen cents (18) per cubic yard of excavation, scow measure. [Italics ours.] (Rec., p. 22.)

Under the head "Section 8" of the specifications it is stated (Rec., p. 18):

> 90. *Character of Work.—This work to be done consists in excavating a channel within the side and end lines prescribed by the U. S. agent in charge;* said channel to have a minimum width at bottom of 300 feet and a length of about 26,500 feet, but the engineer officer in charge may require the bottom width to be increased to not more than 800 feet, if the price bid so warrants. * * *
>
> 91. *Material.—The material to be removed consists of clay, sand, gravel, and bowlders, all in unknown proportions.*
>
> 92. *Depth of excavation.—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 4 feet.* [Italics ours.]

The proposal of the contractor contains the following language (Rec., pp. 18 19):

> In accordance with your advertisement of November 9, 1892, inviting proposals for excavation, etc., *for ship channel 20 and 21* feet deep between Chicago, Duluth, and Buffalo, and subject to all of the conditions and requirements thereof, and of your instructions and specifications, dated November 9, 1892, copies of all of which are hereto attached, and, so far as they relate to this proposal, are made a part of it.
>
> We (or) I propose to furnish all labor, materials, and appliances, *and to excavate and* remove the material, etc., *as specified, at the following price.* * * *
>
> Eighth section: *For all material above* a 21-foot grade, removed and *deposited as specified*, for the sum of eighteen cents (18 cts.) per cubic yard of excavation, scow measure. [Italics ours.]

The advertisement invited a proposal of the contractor to excavate material specified as sand, gravel, clay, and boulders, and the proposal as made by the contractor was "to furnish all labor, materials, and appliances, and to excavate and remove the material, etc., as specified."

The attention of the court is especially invited to the significance of the provisions of the specifications relating to section 8, as follows:

> 91. *Material.—The material to be removed consists of clay, sand, gravel, and boulders, all unknown proportions.*

> 92. *Depth of excavation.—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 4 feet.* [Italics ours.]

It will be observed that the contractors did not obligate themselves to excavate all material to a depth of 21 feet or to any definite depth, but rather to excavate sand, gravel, clay, and boulders to a depth prescribed by the United States agent in charge.

The general intent of the improvement was to procure a channel 20 and 21 feet deep. Such intent was expressed by the introductory paragraph of the general advertisement for bids on the eight sections of the improvement. Notwithstanding the general purpose of the contract the contractor here only undertook to remove specified materials.

It appears that in the specifications applicable to sections one, two, three, four, and five, a definite depth of excavation is required. As applicable to section (1) the specification in regard to depth of excavation is as follows:

> 46. *Depth of excavation.*—The bottom of the completed cut shall be in a plane 25.32 feet below the upper surface of the coping of the lock of 1881 in St. Mary's Falls Canal, the face of excavation probably varying from scraping to 5 feet. (Rec. p. 13.)

On page 24 of the brief on behalf of appellee is set out paragraph 42 of the specifications applicable to the contract of 1894 (not the contract involved here) wherein it is required that the excavation shall

be made to a clear depth of 21 feet. By reference to the contract of 1894 it will be observed that it contains the following provision:

> 42. *Character of work.*—The work to be done consists in excavating a channel about 800 feet in length and 400 feet in width to a clear depth of 21 feet below the datum plane established for section 8, ship channel. The estimated excavation above the 21-foot plane is 5,000 cubic yards of bedrock, bank measure, and about 267 cubic yards, scow measure, of material other than bedrock. The estimated amount of bedrock, bank measure, between the 21 and 22 foot planes is 6,202 cubic yards.

It is very evident, therefore, that it was not intended by the contract of 1892 that the contractor should excavate to the depth of 21 feet regardless of material encountered. Under the proper construction of the contract it was not necessary for the contractor to remove any other material than material known as sand, clay, gravel, and boulders, in order to fully perform the contract. Consequently, there was no warranty regarding character of material.

Clearly the contract was to "excavate and remove the material, etc., *specified* * * * for a ship channel * * * and shall receive in full compensation therefor at the rate of eighteen cents (18¢) per cubic yard of excavation, scow measure." The material was specified by sec. 91, as follows:

> *Material.*—The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions. (Rec. p. 18.)

There is no question of warranty—the contract called for the removal of clay, sand, gravel, and boulders, nothing else. The contingency of some other material being encountered which had to be removed, was provided for by the following stipulations of the contract (Rec. p. 23):

> If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quality, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.
>
> No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra

> work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

That this was well understood by the parties is shown by what actually occurred (quoting Finding V, Rec. p. 39):

> Among the specifications for said contract was paragraph 91, which read as follows: "Material: The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions." In the season of 1894 the plaintiffs and defendants discovered a natural bed of limestone rock toward the northerly end of section 8, which was within the boundaries of the excavation called for by the contract, and this rock was a material which was not provided to be removed by the terms of the contract. Whereupon the defendants advertised for bids for the removal of this limestone rock from section 8 of the aforesaid ship channel. The L. P. and J. A. Smith Company, a corporation organized under the laws of the State of Ohio, submitted a bid on said work, which bid was accepted by the defendants, and a contract in writing was entered into by the said corporation with the defendants through Col. O. M. Poe, United States Army, whereby the said corporation agreed to remove said rock and other material at the price of $2.24 per cubic yard of excavation, bank measure. The said corporation

> completed the contract aforesaid on or about June 16, 1895. A copy of said contract and specifications are attached to the petition marked "Exhibit B."

After this second contract was completed, work under the original contract was resumed. (Petition, Paragraph VI; Rec. p. 3.)

If, as the findings recite, rock excavation was again necessary, the procedure provided by the contract should have been followed; and, if the Engineer officer in charge arbitrarily refused to recognize rock as rock and called it sand, clay, gravel, or boulders, and insisted that claimant continue to remove the same at the price of 18 cents per cubic yard, the claimant should have appealed to the Chief of Engineers; or he could have refused to proceed with the work as did Spearin. (*United States* v. *Spearin*, 246 U. S. 132.) Having done neither of these things he rests his right to recover on the arbitrary action and coercion of a subordinate officer of the United States, who, by the terms of the contract, had no authority to bind the Government for extra work, and for whose unlawful or unauthorized acts the Government is not liable.

For the reasons stated the cases of *Hollerback* v. *U. S.*, 223 U. S. 165; *Christie* v. *U. S.*, 237 U. S. 234; *U. S.* v. *Spearin*, 248 U. S. 132, and *U. S.* v. *Atlantic Dredging Co.*, U. S. 253, 1, relied upon by appellee, are not controlling in the present case.

If the court should hold that under the terms of the contract the contractor was obligated to excavate

the channel to a definite depth, regardless of material encountered, and that there was a warranty that the material would consist only of sand, clay, gravel, and boulders, even then the question of a breach of warranty depends upon whether as a matter of fact other material than the material specified was encountered and excavated.

Under the terms of the contract the decision of the engineer's officer in charge as to quality and quantity was final. The Court of Claims has found that the material claimed to be bed rock and limestone rock was classified by the engineer's officer in charge as the material specified in the contract, viz: Sand, clay, gravel, and boulders. Unless, therefore, there was bad faith exercised by the engineer's officer in charge in passing judgment upon the character of material his judgment will not be revised. The Court of Claims did not find as a fact that the United States agent in charge, who was authorized by the terms of the contract to pass final judgment on the quality and quantity of material, had been guilty of fraud or bad faith in the exercise of such power; or that his actions amounted to that. The only finding as to this is in the first sentence of Finding VI:

> A large part of the material which the engineer officer in charge arbitrarily stated to be clay, gravel, sand, and boulders, was in fact limestone rock, etc.

The opinion has no place in the findings; it does not in any way show fraud, but rather makes out a case of coercion. The only finding in the case is that

the action of the engineer officer in charge was arbitrary; and, from the findings, this may be, more properly, attributed to ignorance or error of judgment than to fraud. In fact, fraud can not be inferred unless facts are shown from which no other inference can follow.

In the brief filed on behalf of the appellee counsel undertakes to quote, from the Standard Dictionary, the definition of the word "arbitrary." The quotation, however, does not include the complete definition as given. The court will observe that the correct definition is as follows:

> ARBITRARY: Fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things; non-rational; not done or acting according to reason or judgment; *depending on the will alone; absolute in power;* capricious; tyrannical despotic. [Italics ours.]

In the case of *First Savings & Trust Company* v. *Milwaukee County*, 158 Wis. 207, at page 238, Judge Barnes, speaking for the Supreme Court of Wisconsin on the identical question here involved, says:

> The lawful right which the contractor had was to recover the damages which it sustained by reason of acts done by the engineer fraudulently, in bad faith, or through inexcusable ignorance. As to any orders made in good faith upon matters where there was reasonable ground for the exercise of discretion and in reference to which engineers might honestly differ, the decision of the engineer was binding

and there was no lawful right to redress on the part of the contractor for such orders. We are in doubt as to whether the discussion of this subject is particularly helpful in this case. There are some orders given by the engineer which resulted in extra expense to the contractor and in reference to which it would appear to be a close question on the evidence as to whether the engineer was guilty of anything more than an honest mistake or error in judgment. The court, in making its findings with reference to these items, recited that the orders were arbitrary and unreasonable and without justification or excuse. We are at a loss to know whether the trial court treated every order which he deemed to be an improper order as falling within the category of those described in the findings as being arbitrary. To say that a thing has been done arbitrarily is not necessarily the equivalent of saying that it was done in bad faith or through ignorance or incompetency. The words "without justification or excuse" approach more nearly to finding bad faith, but they are not always used to indicate bad faith. In the light of hindsight we sometimes speak of acts as being unjustifiable or inexcusable in reference to which reasonable minds might differ when they are exercising foresight only.

If, as claimed, the engineer officer in charge, did deliberately, through fraud, call limestone bedrock, sand, gravel, or bowlders, and by threats coerce claimant into removing the same, then his conduct

was clearly tortious, and was of that character for which the Government expressly disclaims liability.

Respectfully submitted.

FRANK DAVIS, JR.,
Special Assistant to the Attorney General.

WILFRED HEARN,
Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 253.

UNITED STATES OF AMERICA,
Appellant,

vs.

L. P. and J. A. SMITH,
Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

STATEMENT OF THE CASE.

This suit was instituted in the Court of Claims by the Appellee, L. P. and J. A. Smith, against the United States to recover losses sustained by the Appellee (the Claimant below), under a certain contract between the Government and the Appellee for the dredging of a channel in the Detroit River below the City of Detroit, a part of the claim being compensation for loss arising on account of breach of warranty by the government in the specifications and contract and part for loss due to enforced delays in the performance of the work.

As set forth in the petition and substantiated by the findings of the Court of Claims, it appears that the claimants, who were partners doing business under the firm name of L. P. and J. A. Smith, in December 1892 entered into a contract with the United States Government for the excavation of a section of a ship channel, covered by certain appropriating legislation, designated as Section 8 and located at the mouth of the Detroit River. The specifications referred to in the advertisement, and which specifications were attached to and made a part of the contract, described the material to be removed as "sand, clay, gravel and boulders, all in unknown proportions." A copy of the contract and specifications, which were attached to the petition as Exhibit "A", appear at Record pages 6 to 24, certain material provisions of which are later more particularly referred to.

Claimants entered into performance of the work embraced in the contract and carried on the same as directed by Colonel Poe, United States Engineer, officer in charge, when in the season of 1894, while engaged in the work toward the northerly end of Section 8, a natural bed of limestone rock, referred to in the findings as "Bar Point Rock Shoal," was discovered within the boundaries of the excavation called for by the contract and the existence of which was unknown to the parties at the time the contract was entered into.

Upon the discovery of this rock shoal, Colonel Poe, the engineer officer in charge, advertised inviting proposals for its removal and The L. P. and J. A. Smith Company, a corporation which the partners had organized, submitted proposals for the work, and its proposal being accepted, a contract for the work was entered into, dated November 9, 1894. Work under this contract

was carried on and completed and final payment made July 11, 1895. A copy of this contract, which was also attached to claimant's petition, marked Exhibit "B," appears commencing at page 25 of the Record.

On the completion of this last named contract by the Smith corporation the claimants resumed work under the first contract and proceeded thereunder as directed until in the year 1897, when the government through Lieut. Col. Geo. J. Lydecker, Corps of Engineers, United States Army, who on the death of Colonel Poe in 1896 had succeeded the latter as the engineer officer in charge of the work, ordered the claimants to work at other certain particular points on the northerly end of said Section 8 on the Rock Shoals known as "Upper Rock Shoal," "Middle Rock Shoal," "Hackett's Rock Shoal," as well as on "Bar Point Rock Shoal," where work had been done under the second contract above referred to, none of which rock shoals were known to exist by either the claimants or government at the time the first contract was entered into.

The material to be excavated at these points was not that specified under the contract of December 31, 1892, viz: clay, sand, gravel and boulders, but was largely limestone bedrock. Claimants protested against being compelled to excavate and remove this material and demanded of the government that an extra price be fixed therefor, but this request was refused and claimants were ordered by Colonel Lydecker to dredge on the various rock shoals above named and excavate the channel to the required depth, the officer stating to them that, should they fail to proceed with the work of excavation as so directed, he would declare them to be defaulting contractors and proceed to have the work done and expense charged to the claimants, paying for it from the

retained percentages in the government's hands due the claimants for work already performed under the contract, and that, if the retained percentages were not sufficient to pay for the work the claimants and their bondsmen would be proceeded against.

The claimants, under protest and under threat of being declared defaulting contractors, as above stated, proceeded with the work as directed and in so doing excavated a large amount of limestone rock and bedrock, the detail with respect to which is set forth in the Findings of Fact, and later instituted this action in the Court of Claims for the loss sustained by it in the excavation and removal of the rock, together with a further claim for loss and damage sustained by reason of delays and suspensions in the work caused by the government.

Although the greater part of the material which was excavated at these shoals was limestone rock and bedrock, it was arbitrarily classified by the engineer officer in charge as being sand, clay, gravel and boulders, this arbitrary classification being made in the face of incontrovertible evidence that the material in question was in fact limestone rock and bedrock.

The case was argued and submitted in the Court of Claims, which, on April 14, 1919, on the facts as found by it and set forth in the Findings of Fact, rendered judgment in favor of the appellee, the claimants below, the court finding claimants to be entitled to $111,585.97 as compensation for damages and loss sustained by reason of the breach of warranty and misrepresentation in the specifications and the contract, and $7718.30 as damages occasioned by the enforced delays in the suspension of work, making a total of $119,304.27, for which judgment was rendered. Motion for new trial was duly filed and overruled and this appeal is now prosecuted by the United States from said judgment.

The Court of Claims in its Findings of Fact has so well stated the case that it seems unnecessary to make any further statement, except as comment upon and some further discussion of the facts is later made in the argument. There are, however, certain parts of the contract and advertisement which we may wish to refer to in the argument and we, therefore, desire to call the Court's attention to the following provisions in the contract and specifications.

THE CONTRACT.

The contract with the government, dated December 31, 1892, which together with the advertisement and specifications referred to therein and made a part of the contract is attached to the petition as Exhibit "A," providing, quoting the language of the contract, (Record, pgs. 21-22):

> "This agreement witnesseth that, in conformity with the advertisement and specification hereunto attached, and which form a part of this contract, the said Colonel O. M. Poe, for and in behalf of the United States of America, and the said L. P. & J. A. Smith for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:
>
> That the said L. P. & J. A. Smith shall furnish all labor, materials, and appliances, and shall excavate and remove the material, etc., as specified, for the width of 800 feet, for a ship channel 20 and 21 feet deep between Chicago, Duluth and Buffalo, located in the eighth section, mouth of Detroit River, and shall receive in full compensation therefor at the rate of eighteen cents (18) cubic yard for excavation, scow measure.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said L. P. and J. A. Smith shall commence and complete the work as specified."

It further provided in part as follows (Record, p. 23):

"It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentages retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sum may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said L. P. & J. A. Smith, as specified when the work contracted for shall have been delivered and accepted, reserving ten per cent from each payment until the whole work shall have been so delivered and accepted."

The advertisement on behalf of the United States inviting proposals for the work recited that—

"Sealed proposals for furnishing all labor, materials and appliances, and excavating a ship channel 20 and 21 feet deep between Chicago, Duluth and Buffalo, will be received at this office until 2 P. M., standard time, on the following dates, and then publicly opened:

* * * * * * * *

For eighth section, mouth of Detroit River, on December 13, 1892.

* * * * * * * *

Specifications, blank forms, and all available information will be furnished on application to this office." (Record, p. 6).

The specifications referred to provided in part:

"29. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it." (Record, p. 9).

"33. The decision of the engineer officer in charge as to quality and quantity shall be final." (Record, p. 9).

"35. * * * Whenever in the specifications 'depth of water' is used, it shall be understood as referred to a water surface 21 feet above the prescribed bottom plane for the first, second, third, fourth, fifth and eighth sections, and 20 feet above the prescribed bottom plane for the sixth and seventh sections." (Record, p. 10).

"37. Inspection.—The order of the work will be determined by the United States agent in charge, and his instructions shall be observed by the contractor and his employees." (Record, p. 10).

"89. Location—This section comprises the improvement of the bar at the mouth of Detroit River.

90. Character of work—*This work to be done consists in excavating a channel within the side and end lines prescribed by the U. S. agent in charge; said channel to have a minimum width at bottom of 300 feet and a length of about 26,500 feet,* but the engineer officer in charge may require the bottom width to be increased to not more than 800 feet, if the price bid so warrants; the estimated excavation for the width of 300 feet being 411,000 cubic yards, scow measure, more or less, and for the width of 800 feet, 1,086,000 cubic yards, scow measure, more

or less. The greatest distance to the dumping ground will not exceed three miles, and the average distance will not exceed two miles.

91. Material—*The material to be removed consists of clay, sand, gravel and boulders, all in unknown proportions.*

92. Depth of excavation—The bottom of the completed cut shall be in the plane prescribed by the U. S. agent in charge; the face of excavation probably varying from scraping to 4 feet." (Record, p. 18).

(The italics in the above quotations from the specifications are ours).

FINDINGS OF FACT.

The Findings of Fact of the Court of Claims are not long and for the convenience of this Court they are here set forth in full, together with the conclusions of law and memorandum opinion filed in connection therewith. (Record, pages 38-41).

Findings of Fact.

I.

"The plaintiffs were at all the times herein mentioned a partnership composed of Louis P. Smith and James A. Smith, doing business under the name of L. P. and J. A. Smith Company. They are citizens of the United States and reside in the city of Cleveland, in the State of Ohio, where was their principal offices, and they have at all times borne true faith and allegiance to the Government of the United States, and have not in any way aided or abetted rebellion against the said Government.

II.

In response to advertisements on behalf of the defendants inviting proposals for furnishing all labor, material and appliances and excavating a ship channel 20 and 21 feet deep the plaintiffs submitted proposals for said work on section 8, which section was at the mouth of the Detroit River, and which section was a part and parcel of the channel appropriated for by the act of Congress of July 13, 1892, known as the river and harbor act.

III.

On December 31, 1892, a contract in writing was entered into by O. M. Poe, Colonel, Corps of Engineers, United States Army, and the plaintiffs, whereby the plaintiffs agreed to excavate a ship channel 20 and 21 feet deep, located in section 8, mouth of Detroit River, in accordance with the specifications attached to said contract, and which were a part thereof, and the plaintiffs were to receive in full compensation for their work 18 cents per cubic yard of excavation, scow measure. A copy of the contract and specifications are attached to the petition, marked 'Exhibit A.'

IV.

The foregoing contract was duly approved by the Chief Engineers United States Army on January 19, 1893, and the plaintiffs in pursuance of said agreement proceeded to execute and carry out the provisions of the said contract, and on October 19, 1897, the plaintiffs were ordered to cease dredging on section 8, and were notified on that day that their contract was completed.

V.

Among the specifications for said contract was paragraph 91, which read as follows: 'Material: The material to be removed consists of clay, sand,

gravel and bounders, all in unknown proportions.' In the season of 1894 the plaintiffs and defendants discovered a natural bed of limestone rock toward the northerly end of section 8, which was within the boundaries of the excavation called for by the contract, and this rock was a material which was not provided to be removed by the terms of the contract. Whereupon the defendants advertised for bids for the removal of this limestone rock from section 8 of the aforesaid ship channel. The L. P. and J. A. Smith Company, a corporation organized under the laws of the State of Ohio, submitted a bid on said work, which bid was accepted by the defendants, and a contract in writing was entered into by the said corporation with the defendants through Col. O. M. Poe, United States Army, whereby the said corporation agreed to remove said rock and other material at the price of $2.24 per cubic yard of excavation, bank measure. The said corporation completed the contract aforesaid on or about June 16, 1895. A copy of said contract and specifications are attached to the petition marked 'Exhibit B.'

VI.

On February 10, 1897, the plaintiffs were informed by Col. Lydecker, Corps of Engineers, United States Army, who was then in charge of the work being done by the plaintiffs under the contract of December 31, 1892, that their contract was extended to July 1, 1897, and was extended from time to time by the defendants for the completion of the work. In that year Col. Lydecker ordered the plaintiffs to work at particular spots toward the northerly end of section 8, or what was known, respectively, as Upper Rock Shoal, Middle Rock Shoal, Hackett Rock Shoal, Lower Rock Shoal, and to do work on the Bar Point Rock Shoal, which had been excavated under the contract of November 9, 1894, with the L. P. and J. A. Smith Company. The material or a large part of the material to be removed from these

points was limestone rock and limestone bedrock. The plaintiffs protested against excavating and removing limestone rock and limestone bedrock, and asked for the fixing of an extra price for doing this work. The defendants refused to fix any other price than that called for by the contract. The defendants insisted that all the material to be removed from the points above enumerated was clay, sand, gravel, and bowlders, and told the plaintiffs that if they did not remove the same the plaintiffs would be declared defaulting contractors; that the work would be taken from them; that the work would be done and the same charged to the plaintiffs; and that it would be paid for from the retained percentages in defendants' hands due the plaintiffs for work already performed under their contract, and if said percentages were not sufficient to pay for the work, the plaintiffs and their bondsmen would be proceeded against.

VII.

A large part of the material which the engineer officer in charge arbitrary stated to be clay, gravel, sand, and bowlders was in fact limestone rock and limestone bedrock, and was not the material which was specified in the contract, and which the plaintiffs had to remove under the terms of the contract.

The quantity of material excavated by the plaintiffs from June 25, 1897, to October 17, 1897, was 33,332 cubic yards, 10 per cent of which was clay, sand, gravel, and bowlders, leaving 29,998 cubic yards of limestone bedrock. From this latter quantity there is to be deducted 1,250 cubic yards, the amount excavated below grade, leaving 28,748 cubic yards of limestone rock and limestone bedrock. Of this latter quantity about 12,990 cubic yards was limestone bedrock and 15,758 cubic yards was limestone rock.

A reasonable price for removing the 12,990 cubic yards of limestone bedrock was $6.22\frac{1}{2}$ per cubic

yard, which would amount to the sum of $80,862.75. A reasonable price for removing the 15,758 cubic yards of limestone rock was $2.24 per cubic yard, which would amount to $35,297.92. These two sums amount to the sum of $116,160.67. The contract price for removing clay, sand, gravel and bowlders was 18 cents per cubic yard; 3,333 cubic yards of this material at 18 cents added to $116,160.67 makes the sum of $116,760.61. From this sum must be deducted the sum of $5,174.64, being the 18 cents per cubic yard paid the plaintiffs on the 28,748 cubic yards removed by them from June 25, 1897, to October 19, 1897, leaving due the plaintiffs by the defendants the sum of $111,585.97, which sum remains unpaid.

VIII.

From June 25 to October 19, 1897, the defendants insisted upon locating for the plaintiffs the points where dredging was to be done, and the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result, the plaintiffs being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period, from June 25 to October 19, 1897, was 385 hours and 55 minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30.

Conclusions of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiffs are entitled to recover the sum of $111,585.97 set out in Finding VII and the sum of $7,718.30 set out in Finding VIII. It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of One hundred and nineteen thousand three hundred and four dollars and twenty-seven cents ($119,304.27).

Memorandum.

The plaintiffs in this case had a contract with the Government whereby they agreed to move from a ship channel certain material, which was specifically set forth and described in the specifications attached to the petition. The defendants over the protests of the plaintiffs required them to excavate and remove material which was not included in the contract. The defendants insisted in the face of incontrovertible evidence that the material which they required the plaintiffs to excavate and remove was the material described in the specifications, and stated to the plaintiffs that if they did not remove it they would be declared defaulting contractors; that the work would be taken from them, and would be done and charged to them, and paid for from the retained percentages due the plaintiffs for work already performed, and that if these percentages were not enough to pay for the work, the plaintiffs and their bondsmen would be proceeded against. Under these circumstances the plaintiffs excavated and removed the material, which the evidence in this case plainly shows was not the material described and specified in the contract and specifications. We think the right of the plaintiffs to recover the price for the work done by them is undisputable."

ADDITIONAL FINDINGS.

The additional findings of fact made in pursuance to the order of this Court, do not change the facts in the case set forth in the original findings but merely name specifically Col. Lydecker and certain other Government agents as giving certain orders and directions in some instances where the original findings stated the action to have been that of the defendant itself. These additional findings are set forth in full at page 10 of the Appellant's Brief.

ARGUMENT.

The points relied upon by appellant in this appeal are set forth in the summary designated as Brief of Argument, appearing on page 11 of appellant's brief. These points are five in number and are subsequently treated in the brief under separate headings. We will take them up in the order of their discussion there.

I. This suit is not based on a claim for extra work within the meaning of the provisions of the contract requiring such extra work to be covered by special agreement in writing approved by the Chief of Engineers.

It is claimed by Appellant in points 1 and 2 in the Brief of Argument so-called that "The work performed, for which an allowance of $111,585.97 was made, was not provided for or required by the terms of the contract but was extra and outside of the contract," and that "no obligation to pay for extra work was created because the provisions of the contract relating to the procurement of, and the payment for, extra work were not complied with, and that there was not a waiver of such provision."

This, we submit, is an entirely erroneous conception of the theory of the case. The contract provided for the excavation of a ship channel which in section 8, the section covered by the contract, was to be 21 feet deep with a minimum width at the bottom of 300 feet and 26,500 feet in length, to be compensated for by the government at the rate of eighteen cents per cubic yard of excavation. The material to be removed, as set forth in the specifications upon which the contract was let and which, by its terms, became a part of it, was stated as consisting of *"Clay, sand, gravel and boulders, all in unknown proportions."* (Record, p. 18).

During the progress of the work certain rock shoals were discovered within the section of the channel covered by the contract, the existence of which were unknown to the parties when the contract was entered into. The excavation of the ship channel to the specified depth required at these points the removal of limestone rock and limestone bedrock, which would involve greatly increased expense as compared with the dredging of clay, sand, gravel and boulders. When this discovery was made the claimants protested against excavating and removing limestone rock and limestone bedrock and requested of the government that an extra price be fixed for doing this work.

If an agreement had been reached with respect to this and the claimants had voluntarily proceeded with the work on the rock shoals, relying upon some understanding had with the engineer officer or his subordinates as to receiving an extra price for such work and without having such understanding reduced to writing and approved by the Chief of Engineers, the case would then come under the rule relied on by the appellant and no recovery could be had by reason of failure to comply with the provisions of the contract with respect to such claims for extra work. This, however, is not what happened here, the Court of Claims finding specifically on this point as follows:

> "The plaintiffs protested against excavating and removing limestone rock and limestone bedrock and asked for the fixing of an extra price for doing this work. *The defendant refused to fix any other price than that called for by the contract.*" (Italics ours, Record, p. 40).

Thus we find that upon discovery of the bedrock the claimants protested against being required to excavate it and requested the fixing of an extra price for

doing the work. This was refused by the government. Thereupon, Colonel Lydecker, the engineer officer then in charge who had succeeded Colonel Poe, apparently refusing to recognize the existence of the bedrock or that in any event its existence relieved the claimants from excavating at those points to the full channel depth, insisted that the contractors proceed with such excavation, telling them that if they did not so proceed they would be declared defaulting contractors, the work would be taken from them, be let to others, charged to them and paid for out of the retained percentages and they and their bondsmen proceeded against for any excess cost.

Apparently, in order to appear consistent in so requiring the contractors to proceed with this excavation under the contract and so justify the payment of only eighteen cents per cubic yard for the material removed, Colonel Lydecker, as found by the Court of Claims, arbitrarily classified the material removed as clay, sand, gravel and boulders, when in fact it was for the most part limestone rock and limestone bedrock.

The contractors were faced with the alternative of either proceeding with the work pursuant to the directions of the engineer officer in charge or being declared defaulting contractors and of having the work and their equipment taken away from them, their retained percentages appropriated by the government and they and their bondsmen being subjected to suit for the recovery of the large additional costs which a re-letting of the work would no doubt involve. To have their retained percentages appropriated and their equipment taken from them, with the hazard of protracted litigation, might prove ruinous and they chose the alternative of proceeding with the work under protest, in the expectation of ultimately being able to recover compensation

for the additional work occasioned by the faulty specifications.

In this situation an action for breach of warranty clearly lies and is recognized by many decisions of this Court.

U. S. vs. Utah etc. Stage Co., 199 U. S. 414;
Hollerback vs. U. S., 233 U. S. 165;
Christie vs. U. S., 237 U. S. 234;
U. S. vs. Spearin, 248 U. S. 132;
U. S. vs. Atlantic Dredging Co., 253 U. S. 1.

It would seem unnecessary to review in detail the foregoing cases, each of them being decisive upon the question that where a material representation is made either in the contract or in the specifications, which form a part of the contract, and such representation turns out to be untrue and being deceptive and misleading to the bidder who enters into the contract, the contractor has the right to recover for the loss sustained by him on account of such misrepresentation, such recovery taking the form of an allowance of compensation for the additional work involved.

In *Hollerback vs. United States, supra,* the specifications recited the material to be encountered in connection with a certain part of the work as being "broken stones, sawdust and sediment." A different material was encountered entailing more expensive operations. The Court on pages 171-172 says:

> "A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True the claimants might have penetrated the seven feet of soft slushy sediment by means which would

have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations."

The Court in the *Christie* case above cited, states on page 241:

"There was a deceptive reference of the materials and it misled."

Page 242: "It makes no difference to the legal aspects of the case that the omissions from the records of the result of the borings did not have sinister purpose. There were representations made which were relied upon by the claimants and properly relied upon by them as they were positive * * *."

To the same effect are the other cases above cited, in most of which appears that the contractor proceeded with the work under contract and subsequently made claim for an allowance covering the additional work due to the existence of the conditions different from those specified, and the court allowed recovery therefor.

Appellant admits in its brief (appellant's brief, p. 13) that the provisions of the contract requiring a written agreement covering payment for extra work do not apply—

"(a) When such provisions have been waived by an agent having power to waive the same;

(b) Where there has been a breach of warranty by the government relating to a matter necessary to be done in the performance of the contract by reason of which breach the extra work is required to be performed;

(c) When the extra work is made necessary or procured through the fraud or bad faith of an agent of the government in the exercise of expressly delegated powers."

Concededly, therefore, if this case falls within any of these exceptions, recovery can be had.

For the reasons above stated it appears clear here from the findings of the Court of Claims that there was a breach of warranty by the government relating to a material matter and, if this is true, the appellant's whole contention falls.

With respect to the matter of waiver of an agreement covering the extra work or increased cost involved, we believe that if it were necessary here to rely on such waiver the findings of the Court of Claims disclose facts amounting to such waiver.

It appears that when the contractors discovered the existence of bedrock and the necessity of its removal to accomplish the 21 foot depth they protested against excavating this different material and asked for the fixing of an extra price for doing this work, but that the defendant (namely the United States Government) refused to fix any other price than that called for by the contract (Record, p. 40) and that the engineer officer in charge insisted that the contractors go forward with the work of excavating at these points. The refusal of the government to fix an extra price and its insistence that the contractors go forward without special agreement covering the same seems to us to clearly amount to a waiver of the contract provision concerning the requirement for a special contract. An individual in such case would be estopped by such conduct from claiming that a special agreement should have been made and, if the obligations of the government under its contracts are to be treated as like obligations under contracts between individuals

as stated in the case of *Hollerback vs. United States supra*, we submit that the government is in like manner so estopped.

As to the work being made necessary through the fraud or bad faith of an agent of the government, we submit also that the findings here show such capricious and arbitrary action on the part of the engineer officer in charge as to amount to constructive fraud within the doctrine of the case of *Ripley vs. United States*, 223 U. S. 695, referred to in appellant's brief. This is not an action of tort and no actual fraud or bad faith in the sense of malicious conduct is charged or necessary to be shown, but that the acts of the government's agent were arbitrary and entirely unjustifiable as an exercise of honest discretion is clearly found. We will discuss this phase of the case in later commenting upon appellant's contention in regard to bad faith.

II. Breach of Warranty.

The third point relied upon by appellant in its Brief of Argument is that there was no breach of warranty by the United States relating to a matter material and necessary to the contract. Its discussion of this point is confined to four lines in the brief where it dismisses the whole matter by saying (appellant's brief, p. 14):

> "It does not appear from the facts as found that a breach of warranty on the part of the government made the extra work necessary. The petition does not so allege. Such claim has not been made."

We have already discussed the facts showing such breach of warranty. Certainly the recital in the specifications that the material to be encountered and removed consisted of sand, clay, gravel and boulders was a material representation. The character of material to be encountered in any excavating or dredging operation

is of necessity a material and most important condition as the cost of the operation is almost entirely dependent upon it. So we have here in the specifications a positive statement as to an essential condition of the proposed work which under all of the authorities amounts to a warranty.

The facts of the case show that nearly 90% of the material encountered on these shoals was rock and that 28,748 cubic yards of limestone rock and limestone bedrock were required to be removed and were removed in excavating the channel. That this was a material departure from the specifications and from the representations upon which the contract was let, is self evident. We can hardly see how there could be a clearer case of breach of warranty based upon material representations embodied in a contract, and this is perhaps why appellant has so little to say on the subject in his brief.

It is further said that the petition does not allege a breach of warranty and that no such claim has been made. It is true that the petition in terms does not use the expression "breach of warranty." The petition does, however, state the facts showing such warranty and its breach. It avers the fact that the contract called for the removal only of sand, clay, gravel and boulders, and the specifications, forming part of the contract and which contained this description of the material to be encountered, are attached to the petition as an exhibit. The petition further states that other and different material than that described in the specifications was encountered and that its removal occasioned the loss complained of. This, we submit, is sufficient to sustain a recovery upon the facts as found by the Court of Claims. We will discuss later somewhat more fully the question of the sufficiency of the petition.

III. The Question of Bad Faith.

The fourth point in appellant's brief is that the petition does not allege nor the Court of Claims find that bad faith on the part of an officer of the United States in the exercise of powers conferred upon such officer produced the injury complained of.

It is a misconception of the theory of claimant's action to treat the same as though based upon fraud or bad faith or as involving merely a claim for a mis-classification of the excavated material. Proper analysis of the case shows that a recovery is amply justified on the basis of a breach of warranty within the doctrine of the numerous decisions of this Court hereinbefore cited. The arbitrary and, as we submit, constructively fraudulent action of Colonel Lydecker, the engineer officer in charge, becomes material and is relied upon as justifying claimant's proceeding with the work after discovery of the mistake in the specifications, and further as showing the existence of such mistake.

If Colonel Lydecker's classification of the excavated material as being all clay, sand, gravel and boulders was to be treated as decisive under the clause of the contract providing that "the decision of the engineer officer in charge as to the quality and quantity shall be final," then it might be said that no breach of warranty existed, for the reason that the engineer officer had found that no other or different material had been encountered. The Court of Claims has found as a fact, however, that the material in these rock shoals, where the claimants were required to work, was limestone, 90% of the material there excavated being limestone rock and bedrock and not clay, sand, gravel and boulders; that the engineer officer arbitrarily classified this material as clay, sand, gravel and boulders when it was in fact limestone rock

and bedrock, and in the memorandum accompanying the findings states that this arbitrary action was taken in the face of incontrovertible evidence.

This action of Colonel Lydecker is probably explainable on the theory that he took the view that, if, under the provisions of the contract making his decisions final, he refused to recognize the existence of a different material and required the contractor to go forward without the fixing of an increased price and then classified all material excavated as being material conforming to the specifications, the contractor would be bound thereby and be precluded from making any claim for damages and the contractor be thus made to sustain the additional cost which otherwise would fall on the government. His action in this respect, though perhaps without malice or bad faith in the tortious sense, was so arbitrary, unreasonable and unwarranted as to be constructively fraudulent and was certainly an improper exercise of the discretion vested in him under the contract.

In this connection the facts with respect to what took place when a rock shoal was first discovered in the season of 1894 is important. At that time Colonel O. M. Poe was the engineer in charge of the work, being the officer under whom the original specifications had been drawn up and the work let. When this first rock shoal was discovered by the contractor and the government, Colonel Poe, recognizing that such rock excavation was not contemplated by the contract, let a new contract covering the shoal, fixing a price of $2.24 per cubic yard for all material excavated in lieu of the original contract price of 18¢ for the other material. The advertisement for bids for this work showed that the government recognized the existence of bedrock, the character of the work being described in the specifications contained in

the advertisement, as follows (see Exhibit B, Record p. 25, at page 30):

> "42. Character of work—The work to be done consists in excavating a channel about 800 feet in length and 400 feet in width to a clear depth of 21 feet below the datum plane established for section 8, ship channel. *The estimated excavation above the 21 foot plane is 5000 cubic yards, of bed rock, bank measure, and about 267 cubic yards, scow measure, of material other than bed rock.* The estimated amount of bed rock, bank measure, between the 21 and 22 foot planes is 6,202 cubic yards." (Italics ours).

This contract was let to The L. P. & J. A. Smith Company, a corporation which had been organized by the partners who had undertaken the original contract. This contract, which was entered into in October 1894, was completed in June 1895, and the contractors under the contract of December 1892 thereupon continued work under due extensions of time under said original contract. At this time Colonel Lydecker had succeeded Colonel Poe who had died in 1896 and as the United States Engineer Officer assumed full charge of the work.

Other rock shoals were discovered and Colonel Lydecker directed the contractors to excavate these shoals as well as to do further work on the Bar Point Shoal, where operations had been conducted under the second contract above referred to. Thereupon arose the protests and requests for the fixing of an increased price for this rock work, which resulted in the refusal of the Government to fix such increase price and the arbitrary action of Colonel Lydecker here complained of.

The facts with respect to this second contract were pleaded and are important only as evidence of the original intention of the parties in making the first contract that this contract was not intended to cover rock

work, and as showing the manner in which the matter was treated by the original engineer officer, under whose supervision the main contract was let, when rock work of this character was encountered.

The Court of Claims has found the facts as above stated and found in express terms that the classification by Colonel Lydecker of the material as clay, sand, gravel and boulders, when it was in fact limestone rock and limestone bedrock, was arbitrarily made and so made in the face of incontrovertible evidence.

The word "arbitrarily" means in an arbitrary manner, and "arbitrary" is defined by the Standard dictionary as follows:

> "Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; not done or acting according to reason or judgment; capriciously, tyrannical; despotic."

We submit that the decision of Colonel Lydecker, exercised capriciously, non-rationally and tyrannically and without adequate determining principle or founded in the nature of things, is not an exercise of discretion within the provision of the contract which provides that the decision of the engineer officer in charge as to quality and quantity shall be final. The insistence of this officer that the contractors proceed with the work on these rock shoals under the original contract and his arbitrary classification of the material excavated as being that specified in the original contract, when 90% of it was in fact bedrock, was not the exercise of an honest judgment in discharging the duties imposed upon him. If it was a mistake, it was so gross a mistake and so gross an abuse of discretion as will imply fraud and bad faith in law.

In the cases where this Court has held the decision of a government officer to be final when final discretion

was vested in him under a contract it has used this language:

> "In the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government."

Martinsburg & Potomac R. Co. vs. March, 114 U. S. 549, page 551;
Sweeney vs. U. S., 109 U. S. 618;
Kihlberg vs. U. S., 97 U. S. 398.

In the case of *Saalfield vs. United States*, 246 U. S. 610, the Court in discussing a similar provision in the contract under the terms of which certain tests were to be made subject to the satisfaction of certain officers, said:

> "These officers were to decide not arbitrarily, but candidly and reasonably, whether the tests had been made."

and in the case of *Barlow vs. United States*, 184 U. S. 123, cited by the appellant, the court states:

> "The engineer's decision as to quality and quantity is final when properly exercised."

Can it be said that, where the officer has acted arbitrarily under the facts as here disclosed, his discretion has been properly exercised?

In *Ripley vs. United States*, 223 U. S. 695, also cited by appellant, the court in commenting upon a like contract provision "that the decision of the engineer officer in charge as to quality and quantity shall be final" said on *page 701:*

> "That the very extent of the power and conclusive character of his (the engineer officer in charge) decision raised a corresponding duty that the agent's judgment should be exercised, not ca-

priciously and fraudulently, but reasonably and with due regard to both the contracting parties."

It would be a very strained construction of the law and the contract, a contract framed too by the United States, to construe the power of decision vested in the engineer as the reservation of the right to arbitrarily classify materials regardless of facts and to arbitrarily compel the contractor, under penalty of forfeiting his contract, to proceed with work not contemplated by the contract and differing entirely from the advertisement and specifications upon which the contract was let.

We submit, therefore, that the basis of recovery here is for breach of warranty on the part of the government in the specifications under which the contract was let and which formed a part of it, and that the conduct of the engineer officer in charge of the work is important only as determining whether the contractor is bound by his arbitrary decision that the materials excavated did in fact conform to the terms of the specifications so that no breach of warranty existed. On this phase of the case we claim that such conduct and the arbitrary classification so made was not the proper exercise of the powers and duties vested in him under the contract.

IV. The award for lost time was properly granted.

The Court of Claims has found that the defendants insisted upon locating for the plaintiffs the points where dredging was to be done, and that the plaintiffs were compelled to wait upon the defendants for instructions before they could proceed with their dredging. As a result the plaintiffs, being without authority to continue the work, lost time while waiting for the defendants to locate their work. The time lost during this period from June 25th to October 19th, 1897, was 385 hours and 55

minutes, and the time so lost caused a loss to the plaintiffs of $7,718.30 (Record, p. 41).

The specifications covering the work which was made a part of the contract provided:

> "The order of the work will be determined by the United States agent in charge, and his instructions shall be observed by the contractor and his employees." (Record, p. 10).

The Court of Claims having found that the defendants compelled the claimants to wait for them a total of 385 hours and 55 minutes from June to October, it must follow that the claimants are entitled to damages by reason of said delays, as it has always been the rule of law of this Court that the United States shall be liable the same as an individual would be for causing these delays or for any interference with the contractor which might cause a delay.

United States vs. Smith, 94 U. S. 214;
United States vs. Mueller, 113 U. S. 153.

Appellant in the fifth point of its Brief of Argument announces the proposition that, in order to base a recovery for damages for lost time the claimant must show the exercise of fraud or bad faith by the officer in charge which occasioned the delays. We do not understand that any such rule obtains or that the rule with respect to enforced delays in government work is any different from that as between individuals. The provision of the specifications above quoted providing that the order of work should be determined by the United States agent in charge, was not intended to cover the matter of delay but merely to empower the officer to direct the places where and the order in which the dredging should be done.

It is of course important in any dredging operation where dredges and men have to be kept continuously at the place of work that the dredging operations be conducted continuously and, if unnecessary delays and suspensions of work were caused by the government, the contractor should be compensated for his loss. The Court of Claims has found that from June 25th to October 19th, 1897, the claimant was compelled to wait for the defendants for instructions before they could proceed with their dredging approximately 386 hours. A simple calculation shows that there are 99 working days from June 25th to October 19th. Calculating twelve working hours to each day, which would be a maximum, we find that there would be a total of 1188 working hours during said interval of time. It is, therefore, evident that the claimant, together with its men, machinery, plant and capital was compelled to lay idle approximately one-third of the entire working season due to the lack of superintendence or the refusal of the agents of the United States to locate the points where the dredging was to be done. If it were necessary to find any unreasonableness in the matter of these enforced delays, the facts themselves as found by the Court of Claims, clearly show it.

V. Technical pleading is unnecessary.

The petition shows in substance that the claimants entered into a contract with the United States for the excavation of a section of the ship channel in the Detroit River under an advertisement and specifications which represented the material to be encountered and removed as being clay, sand, gravel and boulders; that during the progress of the work certain rock shoals were discovered which were unknown to either of the parties at

the time of making the contract and which in the excavation of the channel required the removal of limestone rock and bedrock, a material not covered by the original specifications and contract; that the claimants, upon being directed by the engineer officer in charge to proceed with the excavation at these shoals, protested and demanded that an extra price be fixed for doing the additional work, but were compelled by said officer to proceed with the excavation at these points under threat of being declared defaulting contractors and their retained percentages appropriated; that the material so excavated was in fact in large part bedrock and not the material specified in the contract and that by reason of being so compelled to remove the same claimants suffered large loss, the amount of the loss being stated as the fair market value of excavating limestone bedrock, the figures with respect thereto being set forth in the petition.

The petition further alleges the suffering of damage by reason of loss of time sustained by delays in the work caused by the agents of the government superintending the same, under whose direction the contractors were obliged to work.

These allegations are amply sustained by the findings of fact of the Court of Claims, which findings also show the arbitrary and unjustifiable conduct of the engineer officer in compelling the claimants to proceed with the excavation of this different material under the original contract and his arbitrary misclassification of the material removed.

Inasmuch as pleadings of technical formality are not necessary or requisite in the Court of Claims, the claimant set forth in its petition a plain statement of facts upon which it based its claim so far as known to it at the time of instituting the suit, without technical for-

mality, a proceeding which has been authorized and sanctioned by this Court, as stated in the case of *United States vs. Beham*, 110 U. S. 347, in which case the court states:

> "The particular form of the petition in this case ought not to preclude the claimant from recovering what was fairly shown by the evidence to be the damages sustained by him. * * * In a proceeding like the present, in which the claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the Court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition."

See also *Clark vs. U. S.*, 95 U. S. 539.

The petition in this case contains a plain statement of the claim made and sets forth all of the ultimate facts upon which the recovery herein is based. The defendant in the Court below made no objection to the form of the petition. We respectfully contend that it has universally been held by this Court that forms of pleading do not preclude a claimant from recovering what is justly due it as shown by the evidence, and we, therefore, submit that the petition in this case is entirely sufficient.

CONCLUSION.

The Government made positive and direct representations upon which the claimant had the right to rely as to the material to be dredged. The Court of Claims has found that these representations were untrue and that a large part of the material encountered was other than that described in the specifications. The claimant cannot be bound by the arbitrary classification of the materials by the United States engineer officer in charge, by which classification the engineer officer in charge attempted to classify the materials as conforming to the contract regardless of the facts. This case being one for breach of warranty and the claimant having demanded a new contract and the fixing of an extra price for the material encountered differing from that described in the specifications upon the discovery of this different material and which new contract was refused by the defendant, the provisions of the contract relating to extra work do not apply. This case is not based on fraud or bad faith and there need be no allegation or proof of sinister purpose in the misrepresentations to permit a recovery. As to the claim for losses due to delays in the work the United States is liable for the delays caused the contractor the same as an individual would be. We submit, therefore, that the judgment of the Court of Claims should be affirmed.

RUFUS S. DAY,
JOHN E. MORLEY,
ROSCOE M. EWING,
Counsel for Appellee.

UNITED STATES *v.* L. P. & J. A. SMITH.

APPEAL FROM THE COURT OF CLAIMS.

No. 253. Argued March 22, 23, 1921.—Decided April 11, 1921.

1. In the performance of a contract with the United States for the excavation of a channel to specified depths, under attached specifications describing the materials to be removed as clay, sand, gravel, and boulders in unknown proportions, deposits consisting largely of limestone were encountered, the removal of which entailed an expense per cubic yard much exceeding the price fixed by the con-

tract for the materials therein specified. The engineer officer in charge of the work arbitrarily classified these deposits with the materials described by the specifications; ignored the protest of the contractors and their request that a new price be fixed therefor; and required them to proceed, under threats that, otherwise, they would be declared in default and the work taken from them and completed and the cost recouped from the retained percentages of their pay already earned and through legal proceedings against themselves and their sureties. *Held*, that clauses in the contract making decisions of the officer as to quantity and quality of work final, requiring the contractors to observe his instructions and denying any claim for modification of the work not agreed to, or expressly required, in writing,—were inapplicable, and that the contractors were entitled to recover from the United States the cost of excavating the material not covered by the contract. P. 15.

2. Contractors with the United States *held* entitled to recover the amount of a loss due to delays of the engineer in charge in locating the places where they should work. P. 17.

54 Ct. Clms. 119, affirmed.

APPEAL from a judgment against the United States for loss suffered by contractors in performing work not covered by their contract, under the arbitrary exaction of the official in charge, and for loss due to his delay in locating the places where work was to be done. The facts are stated in the opinion.

Mr. Assistant Attorney General Davis, with whom *Mr. Wilfred Hearn*, Special Assistant to the Attorney General, was on the briefs, for the United States.

The provisions of the contract and specifications relied on chiefly by the United States were as follows:

"The decision of the engineer officer in charge as to quality and quantity shall be final."

"The order of the work will be determined by the U. S. agent in charge, and his instructions shall be observed by the contractor and his employees."

"In case of differences arising between the U. S. agent in charge and the contractor in regard to the work or to

the specifications, appeal may be made to the engineer officer in charge."

"The material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions."

"No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers."

The propositions advanced in argument were:

The work was not work provided for or required by the terms of the contract, but extra and outside of the contract.

No obligation to pay for extra work was created, because the provisions of the contract relating to the procurement of, and the payment for, extra work were not complied with, and there was not a waiver of such provisions.

There was no breach of warranty by the United States relating to a matter material and necessary to the performance of the contract.

The petition does not allege, neither has the court found, that bad faith on the part of an officer of the United States, in the exercise of the powers conferred upon such officer, produced the injury of which claimants complain.

The recovery for lost time was not justifiable. The officer in charge was entitled to a reasonable time to locate the places where dredging was to be done, and

the court below has not found that the delay was unreasonable or actuated by bad faith or fraud.

Mr. John E. Morley, with whom *Mr. Rufus S. Day* and *Mr. Roscoe M. Ewing* were on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

April 14, 1919, the Court of Claims rendered a judgment against the United States in favor of L. P. & J. A. Smith (appellees, and we shall so refer to them) for the sum of $119,304.27. To review that judgment this appeal is prosecuted.

The appellees were a partnership doing business at the times herein stated under the firm name of L. P. and J. A. Smith.

In response to an advertisement and after the submission of proposals for work at the mouth of the Detroit River, a contract in writing was entered into December 31, 1892, by O. M. Poe, Colonel, Corps of Engineers, U. S. Army, and appellees, by which the latter agreed to excavate a ship channel 20 and 21 feet deep, located in section 8 of the Detroit River, in accordance with specifications attached to the contract and made a part thereof. They were to receive in full compensation for their work the sum of 18 cents per cubic yard of excavation, scow measure.

The material to be removed was specified to consist "of clay, sand, gravel, and boulders, all in unknown proportions."

In the season of 1894 there was discovered a natural bed of limestone rock within the boundaries of the excavation called for by the contract, which was not provided for by the contract. For the removal of this limestone the United States advertised for bids.

The L. P. & J. A. Smith Company, a corporation of Ohio, and a successor in interest to L. P. and J. A. Smith, bid on the work. The bid was accepted and a contract was entered into November 9, 1894, by which that company agreed to remove the rock and other material at the price of $2.24 per cubic yard of excavation, bank measure. The contract was completed on or about June 16, 1895.

The contract of December 31, 1892, was extended from time to time by Col. Lydecker, the engineer in charge of the work, he having succeeded Colonel Poe, to July 1, 1897. In that year he ordered appellees to work at particular spots toward the northerly end of section 8, at certain designated shoals which had been excavated under the contract of November 9, 1894, with the L. P. & J. A. Smith Company.

And certain other officers, one an assistant engineer, another a sub-inspector, in charge of the work, insisted upon locating for appellees the points where dredging was to be done.[1]

The material or a large part of the material to be removed from those points was limestone rock or limestone bed rock. Appellees protested and asked for the fixing of an extra price for doing the work. This was refused and they were told that if they did not remove the same they would be declared defaulting contractors; that the work would be taken from them, done and charged to them, and be paid for from the retained percentages for work already performed, and, if the percentages were not sufficient for that purpose, they, appellees, and their bondsmen, would be proceeded against. No other officer or officers so told appellees or insisted that all the material to be removed was clay, sand, gravel, and boulders.[1]

A large part of the material, arbitrarily stated to be clay, gravel, sand and boulders, was in fact limestone

[1] Additional finding upon the mandate of this court.

rock and limestone bed rock, and was not the material specified in the contract.

The quantity of material excavated as thus required, and that required by the contract, the findings estimate in detail and the cost of its excavation, in the sum of $116,760.61, from which was deducted the sum of $5,174.64 that had been paid appellees, leaving due to them $111,585.97. It is found besides that delays caused by the engineer in charge resulted in a loss to the appellees of $7,718.30. For these two sums judgment was rendered.

The Court of Claims in a brief memorandum summarized the elements of liability against the United States, concluding as follows: "We think the right of plaintiffs [the appellees] to recover the price for the work done by them is indisputable."

The United States adduces against the conclusion certain provisions of the specifications, the latter being, as we have seen, part of the contract.

They are too long to quote or even summarize. They are to the effect that the decision of the engineer officer in charge as to quality and quantity of work was final and that his instructions were required to be observed by the contractor. And further that modifications of the work in character and quality, whether of labor or material, were to be agreed to in writing and unless so agreed to or expressly required in writing no claim should be made therefor.

The contention overlooks the view of the contract entertained by Colonel Lydecker and the uselessness of soliciting or expecting any change by him. His conduct, to use counsel's description, "though perhaps without malice or bad faith in the tortious sense," was repellent of appeal or of any alternative but submission with its consequences. And we think, against the explicit declaration of the contract of the material to be excavated and its price. The contract provided, in response to advertise-

ments and in fulfillment of bids, for the excavation of a ship channel 20 and 21 feet deep and that "the material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions." To these explicit provisions and their contractual force we may add the judgment and conduct of Colonel Poe, the first engineer officer in charge of the work. He realized immediately when a bed of limestone rock was encountered it was not the material stated in the contract, and without hesitation entered into another contract concerning it, and at a price of significant contrast—18 cents per cubic yard, scow measure, being the price of the first contract, $2.24 per cubic yard of excavation, bank measure, being the price of the second contract.

We think the case is within the principle of *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234; *United States* v. *Spearin*, 248 U. S. 132, and *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1.

We concur, therefore, with the declaration of the Court of Claims that "the right " of the appellees "to recover the price for the work done by them is indisputable," including the loss to them while waiting for the engineer "to locate their work."

Judgment affirmed.

MR. JUSTICE DAY and MR. JUSTICE MCREYNOLDS took no part in the decision.